TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 104.

DOÑA MARIA FRANCISCA O'REILLY DE CAMERA, COUNTESS OF BUENA VISTA, PLAINTIFF IN ERROR,

vs.

JOHN R. BROOKE, MAJOR GENERAL, U. S. A.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 26, 1898.

(20,372.)

(20,372.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 407.

DOÑA MARIA FRANCISCA O'REILLY DE CAMERA, COUNTESS OF BUENA VISTA, PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 5, 1906.

a UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Doña Maria Francisca O'Reilly de Camara, Countess of Buena Vista, plaintiff in error, and John R. Brooke, Major General U. S. A., defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, Doña Maria Francisca O'Reilly de Camara, Countess of Buena Vista, as is said and appears by her complaint: we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the Capitol in the City of Washington, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the first day of Sept. 1906, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this sixth day of Au-
[L. S.] gust in the year of our Lord one thousand nine hundred and six and of the Independence of the United States the one hundred and thirty-first.

[Seal District Court of the United States,
Southern District of N. Y.]

THOS. ALEXANDER,
Clerk of the District Court of the United States of America for the Southern District of New York.

The foregoing writ is hereby allowed.

C. M. HOUGH, *D. J.*

b [Endorsed:] 4–118. Supreme Court of the United States. Doña Maria Francisca O'Reilly de Camara Countess of Buena Vista Plaintiff in Error *vs.* John R. Brooke Major General U. S. A. Defendant in Error. Writ of Error. Coudert Brothers, Attorneys for Plaintiff in Error. Due service of a copy of the within Writ of Error is hereby admitted this — day of —— 189–. 10c. —— ——, Attorney for Defendant in Error. Filed Aug. 6, 1906.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Thomas Alexander, Clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the following pages, numbered from 1 to 59 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of Doña Maria Francisca O'Reilly de Camara Countess of Buena Vista Plaintiff in Error, against John R. Brooke Major General U. S. A. Defendant in Error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 25th day of September in the year of our Lord, one thousand nine hundred and six and of the Independence of the United States the one hundred and thirty-first.

[Seal District Court of the United States,
Southern District of N. Y.]

THOS. ALEXANDER, *Clerk.*

1 United States District Court for the Southern District of New York.

DONA MARIA FRANCISCA O'REILLY DE CAMARA, Countess of Buena Vista, Plaintiff,
against
JOHN R. BROOKE, Major General U. S. A., Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney, within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable George B. Adams, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 24th day of May, in the year one thousand nine hundred and two.

THOS. ALEXANDER. *Clerk.*
COUDERT BROTHERS,
Plaintiff's Attorney.

Office and Post Office Address, 71 Broadway, Borough of Manhattan, New York City.

2 District Court of the United States for the Southern District of New York.

DONA MARIA FRANCISCA O'REILLY DE CAMARA, Countess of Buena Vista, Plaintiff,
against
JOHN R. BROOKE, Major General U. S. A., Defendant.

The plaintiff herein alleges that:

I. She is a subject of the Kingdom of Spain, and a resident of the City of Havana.

II. The defendant John R. Brooke is a Major General in the army of the United States of America, now residing at Governor's Island, in the State of New York, and within the Southern District of New York.

III. For many years prior to 1878 there had been in existence in the Island of Cuba under and in accordance with the Spanish law, a hereditary and alienable office, known as the office of "Alguacil Mayor," or High Sheriff, of the City of Havana.

To this office of High Sheriff, in addition to certain purely official functions, such as the perpetual right of sitting and taking part in the deliberation of the Municipal Council as one of the
3 "Regidores Perpetuos," or Perpetual Councillors, there was attached, among other emoluments, and as a personal and property right, the franchise or right to manage, and to conduct the slaughter of cattle in the City of Havana, and to charge for each head of cattle so slaughtered for use in said city, it being incumbent upon the possessor of this right to see to the inspection of the animals so that only proper and healthy meat should be used, to attend to the cleansing of the premises, the weighing of the meat and its proper transportation to the various retail shops throughout the city.

IV. The said office of Alguacil Mayor, and the property rights and appurtenances thereto, together with the aforesaid right to slaughter cattle and receive compensation therefor, had been, in the year 1728, purchased by one Don Sebastian Calvo de Puerta at public auction, with the consent and approval of the Spanish Crown, such office and all the rights, properties and franchises connected therewith being purchasable, alienable and heritable under the Spanish law.

V. Upon the death of the said Don Sebastian, the office, together with the aforesaid franchise and property right, passed by descent to his grand-son Don Francisco Calvo de la Puerta, whose title received Royal confirmation by letters patent dated May 22nd, 1783.

4 Eventually, the male issue of the owner of the office having become extinct, the office, with all its franchises, property rights and emoluments, with the approval and consent of the Crown, passed to one Count O'Reilly, the husband of the daughter of the last incumbent of the office of High Sheriff, in the male line,

and from him descending to his heirs and successors in accordance with the Spanish law until the actual abolition of the office in 1878, when the said slaughter house franchise was separated from the said office and became vested in the last incumbent and his heirs, pending the payment of indemnity as will hereinafter appear. The said franchise as distinguished from the office came to and was inherited by the Countess O'Reilly of Buena Vista, your plaintiff, who exercised the same down to the first day of June, 1899, when she was deprived thereof by said defendant, as will hereinafter appear.

VI. On the 27th day of July, 1859, there was promulgated by the Spanish Government a law or decree relating to "Municipalities in the Island of Cuba." This law made provision for the reorganization of Municipal bodies and for the choice by the electors of a larger proportion of the members of the Municipal Council, substituting election for heredity.

Among other things, this law provided for the gradual
5 elimination of certain hereditary offices, among them that of Alguacil Mayor, or High Sheriff, and among other provisions were the following:

"Article 96. The perpetual councillors now in office shall continue "their membership in new councils so long as their offices are not "abolished, after payment of indemnity in the respective cases, or "until they lose their office for some legal cause.

"Article 97. The failure without a proper leave to attend meet- "ings for six consecutive months shall be considered as a resigna- "tion from office. *In such a case the reversion to the crown shall not "prevent the indemnity being paid out of the municipal treasury to the "party who has given up his office or to his heirs in the event of his "death.*

"Article 98. Municipalities in which there exist *assignable offices, "to which are attached emoluments or profits of any kind,* shall at once "proceed to make the requisite investigation for the determination "by competent authority (in conformity with existing provisions for "the valuation of dual offices, their sale and the payment of dues to "the Royal Treasury), of the amount to be contributed by each; "and they shall further recommend the measures for raising the "requisite sum, *on the basis that said emoluments shall thereafter be "municipal revenues, subject to the dispositions regulating the establish- "ment, alteration or increase of such revenues.*

"Article 99. The office of *Alguacil Mayor* of Havana, by reason of "its large returns, will be the subject of a special investigation, etc., "etc.

"Article 100. In any of the cases covered by the two preceding "articles, *the holders of the offices referred to shall continue in the exer- "cise of such offices and in the receipt of its emoluments until payment "of the sums that may be respectively fixed upon.*

Under the said law, proceedings for the condemnation of the prop-
erty rights appurtenant to the office of Alguacil Mayor of
6 Havana, were commenced and proceeded with, but not completed; the said office and the various franchises and prop-

erty rights appurtenant and belonging thereto still remaining in force, and being exercised by the holders of the office.

VII. In the year 1878 the Governor General of Cuba published the following decree, which, under the Spanish law, then in force, had the full force and effect of law :

"OFFICE OF THE GOVERNOR-GENERAL
OF THE ISLAND OF CUBA.

"His Excellency, the Governor-General, endorsing and approving "the opinion of the Council of Administration, has been pleased to "order:

"1st. That all the Regidores Perpetuos (Perpetual Councillors) "now forming part of the Municipal Councils of this Island, shall "cease in the fulfillment of the duties pertaining to them. *Their "offices shall no longer be counted among the offices of the Municipal "Council.* All members of the latter shall hereafter be elected in "the manner and form provided by the Electoral Law.

"2d. That the provisions of the law of July 27, 1859, in its addi- "tional and temporary chapter or title, directing that the said 'Reg- "idores Perpetuos' should not be deprived of any *emoluments* to "which they are entitled, *until the proper indemnification therefor be "paid to them shall remain in force.*

"And by order of His Excellency this is published in the official "*Gaceta* for general information.

"Havana, November 2, 1878.

"R. GALBIS, *Secretary.*"

And thus by virtue of said Decree the said office of Alguacil Mayor was wholly abolished.

7 The right and duty, however, of managing and supervising the slaughter of cattle, inspecting and distributing the meat, and collecting and receiving the fixed charge therefor, continued as theretofore, in the last holder of the office and his heirs, pending appraisal and condemnation. The Spanish law was codified in 1889, and the ancient and time honored principle that private property should not be taken for a public use without proper indemnification was thus embodied and expressed in the Civil Code:

"349. No one shall be deprived of his property, unless it be by "competent authority, and with justified cause for public utility and "*never* until he has *previously* been properly indemnified.

"If this requirement has not been complied with, the judges shall "protect, and, in proper cases replace the condemned party in "possession."

VIII. The aforesaid right or franchise belonging to this plaintiff was and always has been recognized as private property by the Spanish law as more fully appears from the following provision of Article 336 of the Civil Code of Spain :

"Article 336. As personal property, are also considered rents or "pensions, either for life or hereditary, in favor of a person or "family; *also purchased public offices, contracts for public services,*" etc.

IX. The proceedings instituted for condemnation not having been completed, and no compensation having been paid, this complainant continued to perform the duties incumbent upon her in the
8 supervision and management of the slaughter house service, and in the full and untrammelled exercise of the privileges attending such performance, to wit, the receipt and collection of the fees and emoluments attached by law to the said rights and privileges until the year 1895, and thereafter did so in conjunction with one Dr. Gustavo Gallet Duplessis, who purchased at a judicial sale an undivided one-half interest in said rights and franchise, as will be stated hereinafter more at large. In performing such service your plaintiff employed some seventy workmen, fifty oxen and more than twenty carts, and incurred great expense in the maintenance of the necessary instrumentalities.

X. The estate of the last Count O'Reilly, and Buena Vista, being for some time prior to 1895 indebted to Don Vito Modesto, Don Jose, Dona Justa Marina and Dona Luisa Ponce y Hernandez for a considerable amount of money, judicial proceedings for the recovery thereof were instituted by the latter against the former before the Court of Guadalupe District of Havana. These proceedings ended in a judgment in favor of the complainants, and for the enforcement of this judgment an attachment was sued out, under the laws of Spain, and by order of the Court, consented to by the defendants, upon one-half of the emoluments to be paid the defendant on account of the slaughter house business.
9 Half of such right or franchise was sold at auction by order of the Court on the 19th of September, 1895, and Doctor Don Gustavo Gallet Duplessis bought it. The sale was approved by the Court, and Doctor Don Gustavo Duplessis since that day has shared with the "O'Reilly family" the emoluments derived from the Havana Slaughter House.

XI. That on and before May 20th, 1899 the whole Island of Cuba was under the military jurisdiction of the United States in pursuance of the Treaty of Paris of December 10, 1898, providing for the relinquishment of the Island of Cuba by the Spanish Government and its temporary occupation by the United States under the declaration in the First Article of the Treaty to the effect that:

"The United States will so long as such occupation shall last "assume and discharge the obligations that may under interna-"tional law result from the fact of its occupation for the protection "of life and property."

And under the further declaration and obligation in said Treaty provided, that:

"The relinquishment of Spanish sovereignty shall not be held "to impair the property or rights which by law belong to the peace-"ful possession of property of all kinds of private individuals of "whatsoever nationality such individuals may be."

10 XII. On or about the said 20th day of May, 1899, one William Ludlow, Brigadier-General in the Army of the United States, was Governor of Havana, exercising jurisdiction over that City, and the defendant herein, John R. Brooke, was at that

time and up to the 13th day of December, 1899, the Military Governor of the Island of Cuba, exercising plenary jurisdiction therein, subject to the President of the United States and the laws and constitution thereof.

XIII. On said 20th day of May, 1899, the said City of Havana and Island of Cuba, being in profound peace and completely subject to the dominion, authority and administration of the United States under its pledge in the aforesaid Treaty for the protection of property and of all rights which by law belong to the peaceful possession of property of all kinds, by private individuals, there existing no immediate and impending danger, or urgent necessity therefor, without notice to the complainant or affording her any opportunity to be heard, and without any complaint of the manner in which she was exercising her said rights and duties, the following order was issued by direction of the said Governor of Havana and published in the official paper, the *Gaceta de la Habana:*

11 "OFFICE OF THE GOVERNOR OF HAVANA,
"HAVANA, *May* 20, 1899.

"Civil Order No. 8.

"It is hereby ordered:

"1. That the hereditary grant or privilege in connection with the "service of the city slaughter house, of which the O'Reilly family, "its grantees, or lessees, are now the beneficiaries by inheritance or "purchase from the original grantee in 1704, is hereby terminated "and declared null and void.

"2. That the City of Havana, through its authorized agents shall "make provision for the execution of such services as shall be "necessary in connection with the care of the slaughter house, the "killing of animals for food, and the delivery of meat to the local "dealers in the city and to this end shall, by hire or purchase, pro- "cure such wagons, carts and draft animals, and engage such ser- "vices as may be necessary, for the purpose in question.

"3. That the present owners, proprietors, grantees, or lessees of "the abrogated privilege may seek in the courts the establishment "and valuation of such equities or legal rights as they may believe "themselves to possess.

"4. That this order shall go into effect on the 1st day of June, "proximo, at which date the city shall be prepared to assume the "services now performed under privilege of the alleged concession.

"By the Governor:

"H. L. SCOTT,
"*Adjutant General.*"

XIV. In pursuance of such order, in the absence of any complaint or charge in respect to the management of the slaughter house, affording no opportunity to be heard, and making no payment or compensation, as required by the aforesaid laws of 1859 and the decree of 1878, this
12 plaintiff was deprived of her property and franchise as hereinabove set forth. Thereupon, this plaintiff feeling ag-

grieved thereby, appealed to the defendant herein, who had full authority over the subject and plenary power, against the said order, and requested that your plaintiff's property be not confiscated or otherwise interfered with until she should be indemnified according to the law, hereinbefore cited, and the said Brooke, the defendant herein, did thereupon issue the following order under date of August 17th, 1899:

"HEADQUARTERS DIVISION OF CUBA,
"HAVANA, *August* 10, 1899.

"No. 137.

"Whereas, appeal has been made against the order of the Mili-
"tary Governor of Havana of May 20, 1899, declaring that 'the
"'hereditary grant or privilege in connection with the service of
"'the city slaughter house, of which the O'Reilly family, its grantees
"'or lessees, are now the beneficiaries by inheritance or purchase
"'from the original grantee in 1704, is hereby terminated and de-
"'clared null and void;'

"Therefore,

"The Military Governor of Cuba directs the publication of the
"following order:

"It being considered prejudicial to the lawful interests and gen-
"eral welfare of the municipality of Havana, and as a measure de-
"manded by public policy and in harmony with preceding orders
"of the Military Government, in view of the condition of affairs
"created in this Island by the cessation of Spanish sovereignty, the
"old alienated office known as 'Alguacil Mayor de la Habana,'
"together with all rights, duties and privileges pertaining thereto,
"or derived therefrom, are hereby abolished, and the right of the
"claimants to ownership thereof of exercising said office or receiv-
"ing any of the emoluments, attributes, prerogatives, or any kind
"of benefit or right whatsoever that have heretofore been
13 "enjoyed therefrom by said claimants to ownership, are
"hereby denied.

"The Municipal Corporation of Havana, therefore may adopt
"proper measures and provide the necessary means of performing
"the municipal services heretofore discharged by the claimants to
"ownership of said office as attributes, prerogatives or duties at-
"tached to the same.

"ADNA R. CHAFFEE,
"*Brigadier-General, Chief of Staff.*"

Thereupon, by the direct order, command and act of the defendant herein this plaintiff was prevented from carrying out the duties incumbent upon her under the rights and franchises granted to her by law as hereinbefore stated and from collecting and receiving the emoluments to which she was entitled in the exercise of such right and has been to this day prevented from collecting the same and deprived of the profit and benefit thereof.

XV. The said act of the defendant was in violation of the aforesaid treaty and was also contrary to the order of the President of the United States, issued on the 13th of July, 1898, embodied by the Secretary of War in General Orders No. 101 of 18th of July, 1898, which said order laid down the following rule among others to be obeyed by all officers of the United States, including the said defendant:

"Though the powers of the Military Occupant are absolute and "supreme and immediately operate upon the *political condition* of "the inhabitants, the municipal laws of the conquered territory,
"*such as affect private rights of persons and property* and pro-
14 "vide for the punishment of crime, are considered as contin-
"uing in force, so far as they are compatible with the new "order of things, until they are suspended or superseded by the oc- "cupying belligerent, and *in practice they are not usually abrogated,* "*but are allowed to remain in force and to be administered by the ordi-* "*nary tribunals,* substantially as they were before the occupation. "* * * One of the most important and most practical problems "with which it will be necessary to deal *is that of the treatment of* "*property.* * * * Private property, whether belonging to indi- "viduals or corporations is to be respected and can only be confis- "cated for cause."

And the said defendant violating the said Treaty and the said orders of the President, acting wholly without the scope of his authority and by means of the wrongful exercise of the force at his disposition did proceed to enforce his said order of August 10, 1899, and did by force and violence deprive your plaintiff of the power to exercise said right or franchise, and to collect the emoluments to which she was by law entitled. Since that date and owing to the act of said defendant, your plaintiff has been deprived of her lawful property, without the indemnity provided by law and guaranteed by the Treaty of Paris and the Constitution of the United States.

XVI. The act of the defendant herein in issuing said order was contrary to the Constitution and the laws of the United States, as well as in violation of the aforesaid provisions of the Treaty of Paris,
and of the aforesaid instructions of the President of the
15 United States; such order was a confiscation of plaintiff's
property, and was wholly unlawful, wrongful, tortious and unauthorized on the part of said defendant; moreover, as peace existed in the Island of Cuba the said tortious and unlawful taking of your plaintiff's property was not and could not be based upon any alleged or supposed right of war. The said order was also in contravention of the aforesaid laws of 1859, relating to Municipalities in Cuba, and to the Captain-General's aforesaid decree of 1878, abolishing the said office of Alguacil Mayor and providing that the person holding the same when it was abolished (and his heirs) should continue to exercise the Slaughter House franchise and collect its emoluments (without holding such office of Alguacil Mayor) until indemnified for the abolition of the said office as in the said laws and decree provided.

Wherefore, your plaintiff having been thus deprived of her own

private property tortiously and wrongfully by the said defendant and having suffered great injury and damage, demands judgment against the said defendant as damages for said injury in the sum of two hundred and fifty thousand ($250,000) dollars, together with the costs and disbursements of this action.

COUDERT BROTHERS,
Plaintiff's Attorneys, 71 *Broadway, Borough of Manhattan, New York City.*

16 FREDERIC R. COUDERT, JR.,
CRAMMOND KENNEDY,
Counsel.

CITY OF HAVANA, CUBA, *ss:*

Dona Maria Francisca O'Reilly de Camara, Countess of Buena Vista, being duly sworn, deposes and says, that she is the plaintiff in the foregoing action; that she has read the complaint herein and knows the contents thereof, and that the same is true of her own knowledge, except as to those matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

MA FRANCISCA O'REILLY DE CAMARA,
Condesa de Buena Vista.

Subscribed and sworn to before me this 14th day of May, 1902.
I further certify that the name of the foregoing deponent was duly corrected before subscribing the foregoing.
[SEAL.] JOSEPH A. SPRINGER,
Commissioner of Deeds for State of New York.

Commission dated Jan'y 23/99.

Endorsed: "Summons & complaint. U. S. District Court Filed May 26, 1902. S. D. of N. Y. Judgment for defendant. See opinion filed January 11, 1906. T. C. H."

17 District Court of the United States for the Southern District of New York.

Amended Answer.

DONA MARIA FRANCISCA O'REILLY DE CAMARA, Countess of Buena Vista, Plaintiff,
vs.
JOHN R. BROOKE, Major-General U. S. A., Defendant.

The Amended Answer of the defendant, John R. Brooke, Major-General, U. S. A., by Charles W. Russell, Special Assistant Attorney General, his attorney, to the complaint of Dona Maria Francisca O'Reilly de Camara, Countess of Buena Vista, the plaintiff therein, respectfully shows the Court:

First. Defendant denies that he committed the wrong to the plaintiff alleged in the complaint.

Second. Defendant, referring to sections 3, 4, 5, 6, 7, 8, 9, and other sections of the complaint, denies that any of the business concerning the slaughtering and inspection of cattle, cleaning the slaughter house, charging for cattle slaughtered, attending to weighing and transportation of meat, as mentioned in those sections, was attached to the office of Alguacil Mayor as a "right," "emolument," or "franchise" or "personal and property right" or "property right" or "appurtenance" or belonged to that office in any way, except as part of the business thereof; and defendant denies that the office existed or was transmissible or transmitted "under" or "in accordance with the Spanish law" or the "Spanish Crown," instead of the will of the person who was King of Spain.

18 Third. Referring to Section 5 of the complaint, denies that the office was in 1878 or at any time separated from the slaughter house portion and that the latter continued after the office ceased to exist, and denies that the office was actually abolished in 1878; but does not deny that the Governor General published the decree as quoted. Denies that the office existed as late as 1878.

Fourth. Defendant denies that the decree of the Governor-General of Cuba mentioned of 1878 had the force or effect of law or that by virtue of it the office of Alguacil Mayor, which is not mentioned in it, was abolished or that the office was separated from the business of managing and supervising, inspecting and distributing, collecting and receiving, mentioned in section 7 of the complaint.

Fifth. Defendant denies, as he has already denied, that there was any such "right or franchise" as alleged, and denies that it was recognized as private property by the Spanish law; but does not deny that the Civil Code of Spain contained the language quoted in Section 8 of the complaint.

Sixth. Defendant denies, as heretofore, any separate existence of the slaughter house service from the office; that any "law" attached any fees or emoluments to the business or office; and that the existence of any "rights and franchises or privileges" distinct from the office and its fees. Defendant does not know and, therefore, denies that seventy workmen, fifty oxen and more than twenty carts were employed by the plaintiff.

Seventh. Defendant, always denying that there were any such things distinct from the office as alleged, admits that Don Gustavo Gallet made a purchase of an interest in the affair in 1895 and thereafter enjoyed one-half of the fees or emoluments of it.

19 Eighth. Defendant denies the allegations of Section 11 of the complaint, and the allegation in Section 12 that defendant was exercising jurisdiction subject to the laws and Constitution of the United States, also the allegations of Section 13, except the order quoted, and says that these involve matters of law and judicial notice. He particularly denies that there was "no immediate and impending danger, or urgent necessity" for the said order and no complaint of the manner in which plaintiff was carrying on the business of the slaughter, etc., of cattle. The defendant denies that

in 1899, after the ratification of the Treaty with Spain, the office in question continued to exist, and denies that, if the property, franchise and rights as claimed had previously existed with or apart from the office, they continued to exist after that treaty was ratified.

Ninth. Defendant denies the allegations of section 14 of the complaint, except the order quoted, and absence of the making of payment or compensation, and except that plaintiff applied to defendant to annul the order of the Governor of Havana. Defendant understands "the direct order, command and act of the defendant" to mean the issuance by him as Governor of the order quoted, dated August 10, since the prior order complained of was to go into effect on June 1, and the exercise of the alleged rights of plaintiff ceased long before August 10, 1899.

Tenth. Defendant denies the allegations of sections 15 and 16 of the complaint, except that he admits that the order of the President is correctly quoted and that, so far as he knows, no compensation was paid to plaintiff.

Eleventh. Defendant for a further defense says that, if the plaintiff has or ever had a right against him as alleged, it cannot be asserted here and no longer exists against him, by reason of a certain provision inserted in a law of Congress and Treaty with Cuba, both subsequent to the Treaty with Spain, and reading as follows:

That all the acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected.

Twelfth. And for a further partial defense to the complaint, defendant says that if plaintiff is entitled to recover, by reason of a contract with another for the actual performance of the cattle services referred to, she was receiving very much less money from the business than is claimed as damages and should recover only accordingly.

Thirteenth. And for a further defense, defendant says that his order of August 10, 1899. complained of, did not produce any effect injurious to the plaintiff, because, on June 9, 1899, her monopoly had been already destroyed by a lawful general order issued on that date regulating the slaughtering business throughout Cuba, based upon sanitary and other like consideration.

Fourteenth. And for a further defense, defendant says that his action and that of the Governor of Havana concerning the slaughter business in Havana resulted from a most urgent and crying necessity concerning the public health of the city and island, for that the manner of conducting the abattoir by the plaintiff had long been and was such that it constituted an intolerable nuisance by reason of the filth poured into the small harbor close to the mass of the population. This, defendant alleges, was the moving cause which led to the issue of the orders complained of, by Gen. Ludlow and himself.

Fifteenth. And the defendant denies each and every allegation in said complaint following Sections 1 and 2 not hereinbefore expressly admitted or excepted, and states that he has no knowledge

or information sufficient to form a belief as to the truth or correctness of the same, and leaves the plaintiff to make such proof thereof as she may be advised.

21 Sixteenth. And defendant says that the office of Alguacil Mayor ceased to exist long before 1899, by express enactment of Spanish law, even if plaintiff and her predecessors were suffered to proceed temporarily as before without legal status or right (except a claim to indemnity from the King of Spain).

Wherefore, the defendant prays that said complaint be dismissed with allowance of costs to him.

(Signed) CHARLES W. RUSSELL,
Special Assistant Attorney General, Attorney for Defendant.

22 DISTRICT OF COLUMBIA, *ss:*

John R. Brooke, being duly sworn, deposes and says, that he is the defendant in the above entitled action; that he has read the answer herein and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

(Signed) JOHN R. BROOKE.

Subscribed and sworn to before me this 1 day of May, A. D. 1905.

(Signed) A. C. CAINE,
Notary Public, D. C.

Endorsed: "Amended answer. U. S. District Court. Filed May 6, 1905. S. D. of N. Y."

23 United States District Court, Southern District of New York.

DON MARIA FRANCISCA O'REILLY DE CAMARA, Countess of Buena Vista, Plaintiff,

vs.

JOHN R. BROOKE, Major-General U. S. A., Defendant.

Coudert Brothers, (Paul Fuller, Frederic R. Coudert and Crammond Kennedy, of counsel), for plaintiff.

Charles W. Russell, Assistant Attorney General, for defendant.

HOLT, *J.:*

This action was brought by the Countess of Buena Vista, a subject of the King of Spain, residing in Havana, Cuba, against Major-General John R. Brooke, to recover damages alleged to have been caused to the plaintiff by an order of General Brooke, made August 10, 1899, when he was Military Governor of the Island of Cuba, abolishing the right or franchise to slaughter cattle in the city of Havana, owned by the plaintiff. A demurrer was originally interposed to the complaint, and overruled. The substantial facts alleged in the complaint are stated in the opinion of the demurrer. (*O'Reilly*

de Camara v. Brooke, 135 Fed. Rep. 384.) After the decision of the demurrer an answer was interposed, evidence taken, and the cause brought on for final hearing upon the pleadings and proofs. Upon the argument some of the defenses which were raised by the demurrer have been referred to, but I have seen no ground to change the views stated in the opinion upon the demurrer. The evidence, however, has brought before the court facts which did not
24 appear upon the face of the complaint, which are claimed to be defenses to the action. These defenses are, in substance, that the abolition of the plaintiff's right or franchise to slaughter cattle in Havana was justified as an act under the police power, in the interests of the public health, and that, the United States Government having ratified the action of General Brooke in abolishing the plaintiff's right or franchise, the plaintiff has no longer any claim against General Brooke, for the damages alleged in the bill.

The substantial facts upon which it is alleged that the order of General Brooke was justified as an exercise of the police power for the protection of the public health are these: The slaughter house, in which the killing of cattle under the concession to the plaintiff was carried on, was established many years ago, by the side of a creek emptying into the harbor of Havana. It was, when established, well outside the settled limits of the city. It was admitted by counsel upon the argument that the real estate constituting the slaughtering establishment had always belonged to the city. A ditch or small canal led from the slaughter house to the creek, and all the offal from the slaughtering of animals was for many years discharged into the creek through this canal. The creek was also a general receptacle for sewage of all kinds from the houses on its banks. The result was that for many years the creek, and particularly its mouth and the part of the bay adjacent, was filled with a decaying and offensive mass of offal and sewage. In the meanwhile, the city had extended until, at the time of the American occupation, a large number of people, of the poorest class, lived in the vicinity of the creek. The general conditions of the health of that portion of the city were very bad. A
25 hospital existed there, in which the death rate was sixty per cent. of all the patients admitted, and the evidence clearly shows as might have been inferred without evidence, that the filthy condition of the creek and of the bay around its mouth was in a very high degree deleterious to the public health. Soon after the American occupation began, General Ludlow, the Governor of Havana, instituted general measures for cleaning the city, and one of the principal things which he did was to remove the accumulated filth in and at the mouth of the Slaughter House creek. A gang of men, with special apparatus provided for the purpose, removed the offensive matter and deodorized it. About 1,000 tons of lime were used for the purpose. The discharge of the offal from the slaughter house through the canal and creek was discontinued, and it was thereafter removed in carts, and properly disinfected. Thereafter the general condition of the slaughter house itself was good. A commission which investigated its management reported that it

was "businesslike and efficient." In January, 1899, the Governor appointed a Finance Commission, to consider and report, among other things, upon the sources of city revenue. That commission made a report in March, 1899, in which it referred in detail to the income of the city, and particularly to the income received from water rents and slaughter houses. It reported, in substance, that the water supply and the right to slaughter cattle had both been conceded to individuals by the Spanish Government, and that but for the private rights of such individuals they would afford a basis of taxation for increased revenues to the city. Thereafter General Ludlow issued orders abolishing the private rights of the owners of these concessions, and turning
26 over the administration of the water supply and of the slaughtering of animals to the municipal authorities, with the result of a large increase in the city revenues from those sources. In my opinion, the evidence establishes that, although the filth in the Slaughter House Creek before the American occupation had been a public nuisance, justifying any action necessary on the part of the authorities, under the police power, to abate it, it was no part of the duty of the plaintiff, under her right to slaughter cattle, to abate it, but it was the duty of the public authorities to keep the creek clean and uncontaminated, as a part of their general duty to provide for the removal of filth, and for adequate sewerage for the city at large. It was the plaintiff's duty to keep the slaughter house clean and wholesome, and the evidence shows, in my opinion, that she did so. I think that the real object of General Ludlow in abolishing her concession was to make it possible to increase the city revenue, and not to improve the public health. It appears, on the evidence, that the main reason why General Brooke issued his order of August 10th was that he was advised that, as a legal question, it was doubtful whether General Ludlow had authority to make the order which he had made on May 20th, and it was deemed advisable that the concession should be abolished by unquestionable authority. I think, however, that General Brooke, when he made the order, was partly actuated by the idea that he was justified in making it for the protection of the public health, he having a general impression that the plaintiff was legally responsible for the former condition of the Slaughter House Creek. In view of all these circumstances, I do not think that the order of General Brooke of August 10th can be justified
27 as a valid exercise of the police power. The thing which the order abolished was not the particular slaughter house where the plaintiff had carried on the business, but was the right to slaughter cattle at all. The city authorities, after the order abolishing the plaintiff's right was issued, carried on the same business, in the same slaughter house, and employed the same manager who had conducted the business for the plaintiff. If the maintenance of the slaughter house at that place for any reason was objectionable, it was in the power of the city to have established another sufficiently far from the settled limits of the city to constitute no nuisance. Indeed, under modern methods of conducting the busi-

ness of slaughtering cattle, in which the entire products of the business are saved and utilized for commercial purposes in various ways, there is no longer any reason why any slaughter house should constitute a nuisance to the neighborhood in which it is placed.

The remaining defence relied on in this case is that the United States Government ratified the action of General Brooke, and that, therefore, whatever claim the plaintiff has is a claim against the United States, or the Republic of Cuba, and not against General Brooke.

The evidence upon this subject, in substance, is that, after General Brooke's order was promulgated, the plaintiff appealed to the Secretary of War, and thereupon the Secretary of War made a decision or order, of which the following is a copy:

"In the matter of the application of the Countess of Buena Vista for revocation of certain order of the military governor of Cuba.

I cannot assent to the proposition that the right to perform any part of the duties, or receive any part of the compensation attached to the office of sheriff of Habana under Spanish sovereignty, constitutes a perpetual franchise which could survive that sovereignty.

28 The fact that the Spanish Crown permitted an office to be inherited or purchased does not make it any less an office the continuance of which is dependant upon the sovereignty which created it.

The services which the petitioner claims the right to render and exact compensation for are in substance an exercise of the police power of the state. The right to exercise that power under Spanish appointment or authority necessarily terminated when Spanish sovereignty in Cuba ended. It thereupon became the duty of the military governor to make a new provision under which this part of the power of the new sovereignty, which took the place of the sovereignty of Spain, should be exercised, and the necessary service rendered to the public. The petitioner has been deprived of no property whatever. The office, right, or privilege which she had acquired by inheritance was in its nature terminable with the termination of the sovereignty on which it depended.

The question whether by reason of anything done before that time the right to compensation from the municipality of Habana has arisen is a question to be determined by the courts of Cuba.

The application for the revocation of the order heretofore made herein by the military governor of Cuba is denied.

ELIHU ROOT,
Secretary of War."

December 24, 1900.

In an act making appropriations for the support of the army, passed March 2, 1901, (31 U. S. St. at L., 897), a provision was inserted, commonly called the Platt amendment, which provided that the President was authorized to "leave the government and control of the island of Cuba to its people so soon as a government shall have been established in said island under a constitution which * * * shall define the future relations of the United States with

Cuba" in certain respects, one of which was "that all acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected." This provision, with the other provisions of the Platt amendment, was incorporated in the treaty with Cuba of May 22, 1903, (33 U. S. St. at L. 2249), and as such is a part of the supreme law of this country.

I think it must be conceded that if the United States Gov-
29 ernment had originally authorized and directed General Brooke to issue the order of August 10th, the United States Government, and not General Brooke, would have been responsible to the plaintiff. If, for instance, Congress had passed an act abolishing the plaintiff's hereditary right to slaughter animals in Havana, and had directed General Brooke to carry it out, no one, in my opinion, could claim that General Brooke was personally liable in damages for obeying the order of the Government. But it is well settled that a subsequent ratification by a government of an official act of its officer is equivalent to original authority. (*Buron v. Denman*, 2 Exch. 167; *The Rolla*, 6 Rob. Adm., 364; *Secretary of State in Council of India v. Kamachee Boye Sahaba*, 13 Moore P. C. 22.)

In *Buron v. Denman*, (2 Exch. 167), the defendant, a commander in the English Navy, was sued for damages for freeing certain slaves and destroying certain slave barracoons or factories on the west coast of Africa, owned by a Spaniard. By the laws of Spain, his ownership of the slaves liberated and property destroyed was valid, and the defendant's act, under the English authorities, was admittedly illegal. After the defendant's action he made a report of it to the Admiralty, and the Admiralty reported the transaction to the English Foreign Office. Thereupon Lord Palmerston, Minister for Foreign Affairs, issued an order approving the conduct of Commander Denman, and it was held that this amounted to a ratification of his action by the English Government, and the suit was dismissed on that ground.

In *The Rolla*, (6 Rob. Adm., 364), an American ship and cargo
was proceeded against for a breach of a blockade. It was
30 claimed as a defense that the blockade was illegal. In reply to this argument, Sir William Scott said: "However irregularly he" (the British commander) "may have acted towards his own government, the subsequent conduct of government in adopting that enterprise, by directing a further extension of that conquest, will have the effect of legitimating the acts done by him, so far at least as the subjects of other countries are concerned."

In *Secretary of State v. Kamachee Boye Sahaba*, (13 Moore P. C. 22), an agent of the East India Company, upon the death of the Rajah of Tanjore, decided that his office was extinct, and that his private property passed to the East India Company. This decision was ratified and approved by the Council. The principle decided is stated in the syllabus: "An act done by an agent of the Government, though in excess of his authority, being ratified and adopted by the Government, held to be equivalent to previous authority."

The action of the Secretary of War on the appeal taken to him by

the plaintiff, in my opinion, must be held to be a ratification of the action of General Brooke by the government of the United States, as the order of Lord Palmerston, approving the conduct of Commander Denman, was held to be an act of the government of England. It presents perhaps a stronger case of ratification by the government than some of the other cases cited. Moreover, the passage by Congress of the act containing the Platt amendment, and the adoption of the treaty with Cuba containing it, was an express ratification, by the highest authority, by the government of the United States, or of Cuba, or of both, of all acts of American officers and agents during the occupation of Cuba by the United States
31 forces. It was, in my opinion, equivalent to a general act of indemnity, which, upon general principles, would have barred an action against the defendant. (*Phillips v. Eyre*, L. R. 6 Q. B. 1.) If there be any doubt whether, under constitutional guarantees, a vested claim of a citizen of the United States could be affected by such governmental action, there can be none, I think, as to the effect of such action upon a claim held by an alien.

In my opinion, the plaintiff has a just claim for damages, for the destruction of her property, against the United States, under its obligations assumed in its treaty with Spain, or against Cuba, under its obligations assumed in its treaty with the United States, or against both governments, but she has no longer any right of action remaining against the defendant.

My conclusion is that the complaint should be dismissed, with costs.

January 11, 1906.

32 District Court of the United States for the Southern District of New York.

DONA MARIA FRANCISCA O'REILLY DE CAMARA, Countess of Buena Vista, Plaintiff,

against

JOHN R. BROOKE, Major-General U. S. A., Defendant.

Findings.

This action having been brought to trial before the court without a jury, upon the stipulation of the parties hereto, the court finds the following facts:

First. The plaintiff is a subject of the Kingdom of Spain, and a resident of the City of Havana.

Second. The defendant, John R. Brooke, is a Major-General in the Army of the United States of America, and at the time of the beginning of this action, was domiciled at Governor's Island, in the State of New York, and within the Southern District of New York.

Third. For many years prior to 1878, there had been in existence in the Island of Cuba, under and in accordance with the Spanish Law, a hereditary and alienable office known as the office of "Alguacil Mayor" or "High Sheriff" of the City of Havana.

Fourth. In 1785 the King of Spain issued the following decree:

"The King to the council, court, and administration of the city of San Cristobal de la Habana:

By my Royal Patent of May 22, 1785, I saw fit to approve and confirm the patent of the office of regidor and alguacil mayor
33 of your city, which Don Juan Manuel de Cagigal the Governor and Captain-General of said city issued on November 8, 1781, in favor of Don Francisca Calvo de la Puerta (to whom the office fell by right of inheritance and upon the death of his father), with the command to hold said office and execute the duties thereof in manner and form as in said patent contained and declared, and in which patent there was inserted by the said governor, among the other prerogatives and privileges pertaining to this office, the conditions which were entered into by Don Sebastian Calvo de la Puerta, grandfather of the said Don Francisco, and his first ancestor to hold said office, to whom it was sold at auction on August 9, 1728—which conditions are to be as follows:

1. That he shall enjoy all the honors and privileges which Don Nicolas de Gatica enjoyed, when said offices were sold to him for the account of the royal treasury, fully and completely, without exception; and likewise those which all his predecessors in these offices have enjoyed and have been entitled to enjoy since their creation; and this is made a special condition.

2. The said Don Nicolas de Gatica was charged with the management of the slaughter house; that is the meat suppliers gave him three reals for each head of cattle killed in said slaughter house for the supply of the city, and it was the duty of the said Don Nicolas to provide butcher carts, and mules for carrying the meat to the butcher shops; and this is a benefit to the contractors, since of their own free will they had engaged to pay the alguacil mayor, Don Pedro Recio de Oquendo, for the advantage which resulted to them for forty years; and the said Don Nicolas de Gatica likewise stipulated in his bid when he bought said offices from his Majesty (notice of which was given to the illustrious city from whose pro-
34 ceedings had, on May 2, 1704, he had appealed) that a notarial instrument should be executed, and therein he made the same conditions, in order that by the sale of said office to him he should be in the same situation.

3. It is stipulated that the purity and cleanness of the slaughtering establishment (matadero) shall be at his charge.

4. If at any time the city should change the system which it has for supplying beef and it should be done by contract with individuals, said offices shall not for this reason lose the right (possession) which they have enjoyed for from time immemorial to this day to receive 3 reals for each head of cattle, since he who holds said offices has to carry out on his part the supervision as expressed in the second condition, without either the alguacil mayor or the individuals being able to cancel that obligation; and the same is to be understood in case cattle are slaughtered at any time for the army; and this is made a condition.

5. There has been attached to these offices the right to place carvers in the public butcher shops of the city at will; so that if any of the magistrates dismiss any of said carvers for not being capable or for other reasons, the person who takes their place must hold at the will of the alguacil mayor, as has been the custom, and this is made a condition.

6. In the public prison he shall have the same authority that other alguacil mayores have had and have been entitled to have, and all the privileges which they have enjoyed and have been entitled to enjoy, notwithstanding they are not inserted here; and this is made a condition.

7. The fees of general visit shall be paid to him and the tithes of the execution, according to law, and if any persons commence an action without paying them, it must be done in brief and
35 plain terms, and the judges before whom the cause is brought must in the meantime see that the right is not disputed; and he shall enjoy the emoluments which his predecessors have enjoyed and have been entitled to enjoy; and this is made a condition.

8. There has been attached to these offices the right to appoint deputies to serve in case of the absence or disability of the proprietor, with all his privileges, including a seat and vote, without paying the half annats or any other fees, as was verified in the appointment which Alonso Valaques de Cueller made of Don Pedro Recio de Oquendo in 1648, and in the patent which the licentiate, Don Nicolas Chirinos Bardobal, issued to Don Nicolas Gatica when he bought these offices of his Majesty; and he (the patentee herein) shall have the power to appoint a deputy whenever it is convenient for him, in order to perform his duties for him when he is absent, ill or otherwise employed, and in default of one, he shall always have one deputy to perform his duties, with the same privileges and honors as the proprietor, subject to the approval of the then governor general, so that he may have the seat, vote and place upon deputations that the proprietor has, and all the honors, without exception, and for this the proprietor need not pay anything, because it is included in the price of the offices; and this is made a condition.

And now, on behalf of the said Don Francisco Calvo de la Puerta, the said covenants or conditions with which Don Nicolas Gatica and the ancestors of the said Don Francisco received these offices have been laid before me, showing very minutely the losses which have resulted from the failure to comply with the said covenants, so that the intendant and minister of the navy permitted contractors to establish butcher shops for supplying the land and naval
36 forces without heeding what the said conditions provide, nor proving the intervention of the alguacil mayor and praying, among other things, that in view of what has been referred to, the distinguished services performed by his house in great emergencies and the other things which he has laid before me, I may deign to command that whatever privileges belong to him by provision of the laws shall be observed and, as special conditions, entered into.

That there shall be paid to him, as is already commanded 3 reals

for each head of cattle killed within the city for the food supply, and 2 reals of every nine arrobas (of meat); so that no cattle shall be allowed to be slaughtered outside of the public abattoir, and that when in any emergency, it may be necessary to do so, it shall be done with the intervention of the alguacil mayor and he shall also supply carvers, butcher carts, and mules.

That he shall be permitted as an obligation of his office to make a health inspection, as well of the ships which may enter the port, their stores and cargoes, acting in the capacity of alguacil mayor; that he may act as such alguacil mayor by himself or through his agents, and that he may execute judicial process in whatever jurisdiction may be required, and he may exact costs of taxation, place a jailor in the prison with the power of alguacil mayor and three others in charge of sweeping and cleaning the butcher shop, exacting the fees fixed for jailors without distinction of slaughterhouse employees or other persons.

Having considered the foregoing in my council of the Indies with the antecedents of the matter, and that which, in the light of all, the Auditor-General's office has reported and my fiscal advised, it has pleased me to order and command you, as I do hereby, that you make no change by any patent, nor permit any to be made, in the rights pertaining to the said office of alguacil mayor,
37 unless in whatever exigency may occur in the economic government of the city, it be done and be understood to be done without detriment to those rights, for, these being preserved, if you have representations to make (to me) against any one, you may do so in the regular form, but without the enjoyment of said rights being suspended in any particular until my royal decision in the matter is rendered. And that under this date, and for the same effect, the governor and intendents of this city shall do the proper thing; and of this my royal cedula record shall be made in this general recording book.

June 27, 1785.

I, THE KING.

(Zamora, Vol. 1, 217, *et seq.*)"

Fifth. To this office of Alguacil Mayor or High Sheriff, there was originally attached the right of sitting and taking part in the deliberation of the Municipal Council as Perpetual Councillors, and certain other official functions. There was also attached in addition to its purely official functions, a personal and property right, being the franchise or right to manage and conduct the slaughter of cattle in the city of Havana, and to make an exact and certain charge or compensation for each head of cattle so slaughtered for use in said city. It was incumbent upon the possessor of this franchise or right, to see to the inspection of the animals, in order that only proper and healthy meat should be used, to attend to the cleansing of the premises in which such slaughtering was done, to the weighing of the meat, and to its proper transportation and distribution to the various retail shops throughout the city.

Sixth. The said office of Alguacil Mayor, and the franchise and

property rights appurtenant thereto, including the right to slaughter cattle for the City of Havana, and to receive compensation therefor, had been in the year 1728, purchased by one Don Sebastian Calvo de la Puerto, at public auction, with the consent and ap-
38 proval of the Spanish Crown; such office and all the rights, properties and franchises connected therewith being purchaseable, alienable and heritable under the Spanish Law.

Seventh. Upon the death of the said Don Sebastian, the said office, together with the aforesaid franchise and property right, passed by descent to his grandson Don Francisco Calvo de la Puerto, whose title received Royal confirmation by Letters Patent, dated May 22nd, 1783. Finally, the male issue of the owner of the office having become extinct, the office with all its franchises, property rights, and emoluments, passed with the approval and consent of the Crown to one Count O'Reilly, the husband of the daughter of the last incumbent of the office of High Sheriff, in the male line, and from him descended to his heirs and successors in accordance with the Spanish Law, until the actual abolition of the office in 1878, when the franchise and property right hereinabove referred to was separated from the said office, and became vested in the last incumbent and his heirs pending the payment of indemnity.

The said franchise as distinct from the office, came to and was inherited by the plaintiff herein, who exercised the same until she was deprived thereof by the action of the defendant herein.

39 Eighth. The plaintiff is a lawful heir of the person in whom the said office of Alguacil Mayor was confirmed by the decree of 1785 above mentioned and said plaintiff in May, 1899, claiming to be the lawful half-owner of the said office of Alguacil Mayor and of the right or privilege thereto appertaining to collect the slaughter tax or duty (derecho de punalada) provided for in said decree, was in actual possession of the slaughter house hereinafter mentioned and was engaged in conducting the same and collecting the sums provided by said decree as the said slaughter tax or duty.

Ninth. In 1859 a law was enacted by Spain, a part of which follows:

"Article 96. The perpetual councillors now in office shall continue their membership in new councils so long as their offices are not abolished, after payment of indemnity in the respective cases, or until they lose their office for some legal cause."

"Article 97. The failure without a proper leave to attend meetings of six consecutive months shall be considered as a resignation from office. In such a case the reversion to the Crown shall not
40 prevent indemnity being paid out of the municipal treasury to the party who has given up his office or to his heirs in the event of his death."

"Article 98. Municipalities in which there exist assignable offices, to which are attached emoluments or profits of any kind, shall at once proceed to make the requisite investigation for the determination by competent authority (in conformity with existing provisions for the valuation of dual offices, their sale and the payment of dues to the royal treasury), of the amount to be contributed by each; and

they shall further recommend the measures for raising the requisite sum, on the basis that said emoluments shall thereafter be municipal revenues, subject to the dispositions regulating the establishment, alteration or increase of such revenues."

"Article 99. The office of Alguacil Mayor of Havana, by reason of its large returns, will be the subject of a special investigation, in which must appear the estimate to be made by the Royal Board of the dues of the present possessor, with reference to the excise; the opinion of the quartermaster General of the Army and the Intendant of the Treasury; the opinion and proposal of the Municipality, given after hearing its auditor and Advocate, the owner, and the report of the Upper Council of Public Property; all of which the Governor Captain General will forward with his own report to the Department of Colonies, for ultimate determination of the whole subject."

Ninth *a*. On the 27th of July, 1859, there was promulgated by the Spanish Government, a law or decree relating to Municipalities in the Island of Cuba. This law provided for the gradual elimination of certain hereditary offices, among them that of Alguacil Mayor. It is provided that the perpetual Councillors then performing their functions by virtue of holding the office of Alguacil Mayor, should continue their membership
41 so long as their offices were not abolished for payment of indemnity in the respective cases; that the loss of the office and failure to attend meetings, should not prevent indemnity being paid out of the Municipal Treasury to the parties so abandoning *his* office-, or to *his* heirs in the event of *his* death; that Municipalities in which there existed assignable offices, to which were attached emoluments or perquisites of any kind, should at once proceed to make the requisite investigation for the determination of the amount to be contributed by each, and should further recommend the measures for raising the requisite sum upon the basis that such emoluments were thereafter to be Municipal Revenues; it further provided that with reference to the office of Alguacil Mayor of Havana by reason of its large returns, it should be made the subject of a special investigation after a hearing of the possessor of the office, the Municipal authorities, and the Treasury Department, and that reports should be made thereon to the Department of Colonies of the Spanish Government, and finally that the holders of the offices referred to, should continue in the exercise of such offices, and in the receipt of the emoluments attached thereto, until payment of the sums that might respectively be fixed upon.

Tenth. Under the said law of 1859, proceedings for the condemnation of the property rights thereunder to the office of Alguacil Mayor of Havana, were commenced and proceeded with, but not completed. The various franchises and property rights appurtenant to said office remained in force and were exercised and enjoyed by the holders of the office until the year 1878.

Eleventh. In 1878 the following decree was issued by the Governor General of Cuba:

"Office of the Governor General of the Island of Cuba."

"His Excellency, the Governor General, endorsing and approving the opinion of the Council of Administration has been pleased to order:

42 "1st. That all the Regidores Perpetuos (Perpetual Councillors) now forming part of the Municipal Councils of this Island, shall cease in the fulfillment of the duties pertaining to them. Their offices shall no longer be counted among the offices of the Municipal Council. All members of the latter shall hereafter be elected in the manner and form provided by the Electoral Law."

"2nd. That the provisions of the law of July 27, 1859, in its additional and temporary chapter, or title, directing that the said 'regidores perpetuos' should not be deprived of any emoluments to which they are entitled, until the proper indemnification therefor be paid to them shall remain in force."

"And by order of His Excellency this is published in the official Gaceta for general information."

"Havana, November 2, 1878.

"R. GALBIS, *Secretary*."

Twelfth. In the year 1878, a decree of the Governor-General of Cuba having the full force and effect of law, was promulgated; by said law the perpetual councillors forming part of the Municipal Councils of the Island including those performing such functions by virtue of holding the office of Alguacil Mayor, ceased in their fulfillment of the duties appertaining to such Council. The said law further provided that the provisions of law of July 27th, 1859, decreeing that the said perpetual councillors should not be deprived of any emoluments to which they were entitled until the proper indemnification therefor be paid to them, should remain in force.

Thirteenth. The slaughter house in which the slaughter of cattle was carried on was the property of the Municipality of Havana.

Fourteenth. Said slaughter house was built on the side of and contiguous to Slaughter House creek which emptied into the Bay of Havana. A ditch or small canal led from the slaughter house to the creek, and all the offal from the slaughter of animals had been for many years discharged into the creek through the canal. The creek was also the general receptacle for sewage of all kinds

43 from houses on its banks, and the result was that for many years the creek, and particularly its mouth and the parts of the bay adjacent had been filled with the decaying and offensive mass of offal and sewage.

Fifteenth. When said slaughter house was constructed its location was well outside of the settled limits of the city, but by 1899 the city had extended so that a large number of people, of the poorest class, lived in the vicinity of the creek. The general condition of the health of that portion of the city was very bad. A hospital existed there in which the death rate was sixty per cent. of all the patients admitted. The evidence clearly shows that the filthy condition of the creek and of the bay around its mouth was in a very high degree deleterious to the public health.

Sixteenth. The plaintiff carefully cleaned the interior of the slaughter house, and the Finance Commission of Havana, which investigated the management of the slaughter house reported that it was business-like and efficient. Except as it shares the filthy exhalations of the locality, it was kept pure and wholesome.

Seventeenth. The right and duty of the plaintiff of managing and supervising the slaughter of cattle in the City of Havana, inspecting and distributing meat, and the collecting and receiving of the charges and compensations therefor, continued as a property right in the holder of the office and his heirs pending appraisal and condemnation.

Eighteenth. Under the Spanish law, purchaseable public offices are considered as personal property unless taken by competent authority for purposes of public utility, and in no case can they be taken until such person had been previously indemnified for the same.

44 Nineteenth. The proceeding instituted for the condemnation of the property rights appurtenant to the office of Alguacil Mayor of Havana, were not completed, and no compensation was paid to the plaintiff. She continued to perform the duties incumbent upon her in the supervision and management of the slaughter house service, and in the full and untrammelled exercise of the privileges attending such performance, including receipt and collection of the fees and emoluments attached by law to the said rights and franchises until the year 1895. In 1895 by a judgment of the 19th of September, in an action for the recovery of a debt due by the Estate of Count O'Reilly, deceased, one-half interest in the said franchise or property right was sold at judicial public sale, and was purchased by one Gustavo Gallet Duplessis, and thereafter the performance of the services required under the conditions of such franchise, and the receipt and collection of the fees and emoluments thereunder, were jointly performed and enjoyed by the complainant and the said Duplessis.

Twentieth. The slaughter house in which the slaughtering of cattle was to be carried on under the aforesaid franchise or consent, was the property of the Municipality of Havana, according to the admission of counsel on the trial.

Twenty-first. It was the plaintiff's duty to keep the slaughter house of which she had the franchise, clean and wholesome, and she did so.

Twenty-second. The offal from the slaughter houses of the Municipalities, both for the slaughter of cattle, and for the slaughter of smaller animals, was for many years discharged into a creek emptying into the Harbor of Havana; this creek was also the receptacle for sewage of all kinds from the houses on its banks. The result was, that for many years the creek and particularly its mouth and the part of the bay adjacent, were filled with the decaying

45 accumulations of an offensive mass of offal and sewage. The filthy condition of the creek and of the bay around its mouth, was in a high degree deleterious to the public health, (p. 2, Opinion, p. 28 Sten. Min).

Twenty-third. Before the American occupation, the filth in this creek known as Slaughter House Creek, had been a public nuisance.

Twenty-fourth. It was no part of the duty of the plaintiff under her right to slaughter cattle, to abate such nuisance.

Twenty-fifth. That on or about the first day of January, 1899, in pursuance of a treaty between the United States and the Kingdom of Spain, dated December 10th, 1898, Spain relinquished all claim of sovereignty over, and title to, the Island of Cuba, and the United States, pursuant to said treaty, occupied the Island of Cuba throughout the year 1899, and during that time exercised all such jurisdiction and discharged all such obligations as resulted from the fact of its occupation pursuant to such treaty and pursuant to international law.

Twenty-sixth. It was the duty of the public authorities, to keep the creek clean and uncontaminated, as a part of their general duty to provide for the removal of filth, and for adequate sewerage for the city at large (p. 4 Opinion).

Twenty-seventh. Soon after the American occupation, the accumulated filth in and at the mouth of the Slaughter House Creek, was removed and deodorized; the discharge of the offal from the slaughter house through the creek was discontinued, and it was thereafter removed in carts by the authorities and property deodorized.

Twenty-eighth. Soon after the American occupation began General Ludlow, the Military Governor of Havana, instituted general measures for cleaning the city. He reported to General
46 Brooke, the defendant, that he had repeatedly demanded of the plaintiff, that she should clear away the filth which had accumulated in and about the Slaughter House Creek. These attempts to have the plaintiff clear away the filth about the slaughter house were reported to defendant as unsuccessful. General Ludlow thereupon on April 1st, proceeded to remove the said accumulated filth in and about the said creek, using a gang of men with special apparatus provided for the purpose, and removed the offensive matter and deodorized it. About 1,000 tons of lime was used for the purpose. While General Ludlow was still engaged upon this work of clearing up the nuisance about the creek caused by the offal, the orders of May 20 and August 10, 1899, below mentioned, were promulgated. Plaintiff was ordered in April not to put any more offal into the canal leading to the creek. The expense of disposing of the offal fell upon the City.

Twenty-ninth. In January, 1899, a Finance Commission was appointed by General Ludlow, Military Governor of the City of Havana, to consider a report upon the source of city revenue. This Commission reported that the water supply and the right to slaughter cattle had both been conceded to individuals by the Spanish Government, and that but for the private rights of individuals, they would afford a basis for taxation for increased revenue to the City. General Ludlow thereupon, in order to make it possible to increase the City revenue, issued orders abolishing the private rights of the

owners of said concessions, including the franchise or conces-
47 sion owned by the plaintiff, and turning over the administra-
tion of the water supply, and of slaughter of animals to the Municipal authorities. The result was a large increase in the city revenues from these sources. At the time such orders were issued, the nuisance of the slaughter house — into which the offal of the slaughter house and the sewage from houses had theretofore been allowed to run, had been abated. The purpose of the order was not to improve the public health, but to increase the city revenue.

Thirtieth. In January, 1899, said General Ludlow appointed the Finance Commission above mentioned to consider and report among other things upon the source of the city revenue. That Commission made a report in March, 1899, in which it referred in detail to the income of the city and particularly to the income received from water rents and slaughter houses. It reported in substance that the water rents and derecho de punalada or slaughter tax or duty had both been conceded to individuals by the Spanish Government, and but for the private rights of such individuals they would afford a basis of taxation for increased revenues to the city.

Thirty-first. May 20, 1899, General Ludlow, said Governor of Havana, promulgated the following order:

"OFFICE OF THE GOVERNOR HAVANA,
"HAVANA, *May* 20, 1899.

"Civil Order No. 8.

"It is hereby ordered:

"1. That the hereditary grant or privilege in connection with the service of the city slaughter house, of which the O'Reilly family,
its grantees, or lessees, are now the beneficiaries by inherit-
48 ance or purchase from the original grantee in 1704, is hereby terminated and declared null and void."

"2. That the City of Havana, through its authorized agents, shall make provision for the execution of such services as shall be necessary in connection with the care of the slaughter house, the killing of animals for food, and the delivery of meat to the local dealers in the city, and to this end shall by hire or purchase, procure such wagons, carts and draft animals, and engage such services as may be necessary for the purposes in question."

"3. That the present owners, proprietors, grantees or lessees of the abrogated privilege may seek in the courts the establishment and valuation of such equities or legal rights as they may believe themselves to possess."

"4. That this order shall go into effect on the 1st day of June, proximo, at which date the city shall be prepared to assume the services now performed under privilege of the alleged concession."

"By the Governor:

"H. L. SCOTT,
"*Adjutant General.*"

Thirty-second. An appeal was made from this order of General Ludlow to the defendant who was at the time Military Governor of the Island of Cuba. It was a matter of doubt whether General Ludlow had authority to make the order appealed from and for that reason the defendant at that time Military Governor of the Island, as aforesaid, made and published an order in his capacity as Governor which cancelled and abolished the concession or franchise owned by the plaintiff.

Thirty-third. On August 10, 1899, Major General John R. Brooke, Military Governor of the Island of Cuba, promulgated the following order:

"No. 137.

"HEADQUARTERS DIVISION OF CUBA,
"HAVANA, *August* 10, 1899.

"Whereas appeal has been made against the order of the Military Governor of Habana of May 20, 1899, declaring that 'the hereditary grant or privilege in connection with the service of the city slaughter house of which the O'Reilly family, its grantees or lessees, are now the beneficiaries by inheritance or purchase from the original grantee in 1704, is hereby terminated and declared null and void.'"
"Therefore,

The Military Governor of Cuba directs the publication of the following order:

It being considered prejudicial to the lawful interests and general welfare of the municipality of Havana, and as a measure demanded by public policy, and in harmony with preceding orders of
49 the Military Government, in view of the condition of affairs created in this Island by the cessation of Spanish sovereignty, the old alienated office known as 'Alguacil Mayor de la Habana,' together with all rights, duties and privileges pertaining thereto, or derived therefrom, are hereby abolished and the right of the claimants to ownership thereof of exercising said office or receiving any of the emoluments, attributes, prerogatives, or any kind of benefits or rights whatsoever that have heretofore been enjoyed therefrom by said claimants to ownership, are hereby denied. The Municipal Corporation of Havana therefore may adopt proper measures and provide the necessary means of performing the municipal services heretofore discharged by the claimants to ownership of said office as attributes, prerogatives or duties attached to the same."

"ADNA R. CHAFFEE,
"*Brigadier-General, Chief of Staff.*"

Thirty-fourth. General Brooke, prior to Ludlow's order received frequent reports from General Ludlow upon sanitary conditions and improvements in Havana. General Ludlow told General Brooke the slaughter house refuse was exceedingly unsanitary, and a source of pollution.

Thirty-fifth. The defendant General Brooke was partly actuated in making said order by the idea that he was justified in making it for the protection of the public health, he having a general impres-

sion that the plaintiff was legally responsible for the former condition of the Slaughter House Creek.

Thirty-sixth. This order of the defendant was made on the 10th of August, 1899. It abolished not the particular slaughter house where the plaintiff had carried on the business of slaughtering cattle, and which slaughter house belonged to the Municipality of Havana, but abolished the right of the plaintiff to slaughter cattle at all.

Thirty-seventh. The said authorities after the order abolishing the plaintiff's right was issued, carried on the same business in the same slaughter house and employed the same manager who had conducted the business for the plaintiff.

50 Thirty-eighth. The City authorities, until the order of August 10, 1899, was issued, conducted the business of slaughtering cattle in the same slaughter house under the same management and under new rules and system.

Thirty-ninth. The order of General Brooke was not justified as a valid exercise of the police power.

Fortieth. Subsequent to the promulgation of said Order by said Brooke, the plaintiff appealed to the Secretary of War, of the United States, to have said Order revoked. Thereupon Secretary of War made the following decision or Order:

"In the matter of the application of the Countess of Buena Vista for revocation of certain order of the military governor of Cuba. I cannot consent to the proposition that the right to perform any part of the duties, or receive any part of the compensation attached to the office of sheriff of Havana under Spanish sovereignty, constitutes a perpetual franchise which could survive that sovereignty. The fact that the Spanish Crown permitted an office to be inherited or purchased does not make it any less an office the continuance of which is dependent upon the sovereignty which created it.

The services which the petitioner claims the right to render and exact compensation for are in substance an exercise of the police power of the State. The right to exercise that power under Spanish appointment or authority necessarily terminated when Spanish sovereignty in Cuba ended. It thereupon became the duty of the Military Governor to make a new provision under which this part of the power of the new sovereignty, which took place of the sovereignty of Spain, should be exercised, and the necessary service rendered to the public. The petitioner has been deprived of no property whatever. The office, right, or privilege which she has acquired by inheritance was in its nature terminable with the termination of the sovereignty on which it depended.

The question whether by reason of anything done before that time the right to compensation from the municipality of Havana has arisen is a question to be determined by the Courts of Cuba. The application for the revocation of the order heretofore made herein by the Military Governor of Cuba, is denied.

ELIHU ROOT,
Secretary of War."

the supervision which the Municipality admittedly exerci

Forty-first. Thereafter and on or about the 28th of December, 1900, the Government of the United States ratified and adopted the action of General Brooke through an order of the Secretary
51 of War, and on the 2nd day of March, 1901, by the provision of an act of Congress passed on said day, commonly known as the Platt Amendment, which Act provided that the President was authorized to " Leave the Government and control of the Island of Cuba to its people, as soon as a Government shall have been established in said Island under a Constitution which shall define the future relations of the United States with Cuba " in certain respects, one of which was " that all acts of the United States in Cuba during its military occupancy thereof, are ratified and validated and all lawful rights acquired thereafter should be maintained and protected;" and lastly on the 22nd of May, 1903, by a treaty with the Republic of Cuba, in which the so-called Platt Amendment was embodied and approved.

Findings of Law.

I. The Franchise and the property rights of plaintiff therein had not ceased to exist when it was abolished by the order of the defendant of the 10th of August, 1899.

II. The said order was not justified as a valid exercise of the police power.

III. Although the filth in the slaughter house creek before the American occupation had been a public nuisance justifying any action necessary on the part of the authorities under the police power to abate it, it was no part of the duty of the plaintiff under her franchise, granted by the above laws, to abate it, but it was the duty of the public authorities to keep the creek clean and uncontaminated as a part of their general duty to provide for the removal of filth and for adequate sewerage for the city at large.

IV. By the action of the governmental authorities of the United States through the order of the Secretary of War, on December 24th, 1900, the Act of Congress of March 2nd, 1901, and the Treaty with the Republic of Cuba of May 22nd, 1903, the *the* Gov-
52 ernment of the United States ratified the action of the defendant General Brooke in abolishing the plaintiff's franchise for the slaughter of cattle by his order of August 10th, 1899, and the plaintiff's claim against the defendant became a claim against the United States. The plaintiff has a just claim for damages for the distruction of her property against the United States under its obligations assumed in the Treaty of December 10th, 1898, with Spain, but by reason of the ratification by the Government of the United States of the action of the defendant herein, plaintiff has no longer any right of action remaining against such defendant.

V. The complaint should be dismissed with the costs of this action.

GEO. C. HOLT, *J.*

Endorsed: " Findings. Filed June 29th 1906."

53 United States District Court for the Southern District of New York.

DONA MARIA FRANCISCA O'REILLY DE CAMARA, Countess of Buena Vista, Plaintiff,
against
JOHN R. BROOKE, Major General U. S. A., Defendant.

Now comes the plaintiff, to wit: Dona Maria Francisca O'Reilly de Camara, Countess of Buena Vista, and makes and files these her exceptions to the findings and decision of the Honorable George C. Holt, filed herein on June 29th, 1906, to wit:

1. She excepts to so much of the Conclusion of Law numbered IV as finds and decides that the Government of the United States ratified the action of the defendant in abolishing the plaintiff's franchise, upon the ground that such conclusion of law is not supported by and is not in accordance with the facts as found by the Court, and is erroneous in law.

2. She excepts to so much of the Conclusion of Law numbered IV as finds and decides that by reason of ratification by the United States Government of the action of the defendant herein, the plaintiff has no longer any right of action remaining against the defendant, on the ground that such conclusion is erroneous in law and contrary to law.

3. She excepts to the Conclusion of Law numbered V on the ground that such conclusion is not supported by, and is not in accordance with the facts as found, and on the ground that upon the facts as found, judgment should have been directed in favor of the plaintiff and against the defendant.

Dated August 4th, 1906.

COUDERT BROTHERS,
Attorneys for Plaintiff, 71 *Broadway, N. Y. City.*

Endorsed: Plaintiff's exceptions. U. S. District Court. Filed Aug. 6, 1906. S. D. of N. Y.

54 United States District Court, Southern District of New York.

Judgment.

DONA MARIA FRANCISCA O'REILLY DE CAMARA, Countess of Buena Vista, Plaintiff,
against
JOHN R. BROOKE, Major General U. S. A., Defendant.

This action having been brought on for trial upon the issues of fact and law before the Hon. George C. Holt, United States District Judge, a jury being expressly waived by counsel for the respective parties hereto, at a Stated Term of this Court, held on the 20th day of Oct. 1906, at the Post Office Building, in the Borough of Manhat-

tan, City of New York, for the Southern District of New York, and the plaintiff having appeared by Coudert Brothers, Esqs., her attorneys, and the defendant by Henry L. Burnett, Esq., United States Attorney, and after due deliberation having been had, and said Court having decided the issues of fact and law herein involved as appears from the findings of fact and conclusions of law as settled and filed in the office of the Clerk of the United States District Court for the Southern District of New York, on the 29th day of June 1906, and said conclusions of law being in favor of the defendant and against the plaintiff and dismissing the complaint of the plaintiff with costs, and the costs of the defendant herein having been adjusted at the sum of Twenty-nine and 85/100 dollars ($29.85),

Now, on motion of Henry L. Stimson, Esq., United States Attorney, attorney for the defendant, it is

Ordered, adjudged and decreed, that the complaint herein be and the same hereby is dismissed.

And it is further ordered, adjudged and decreed, that the defendant recover of the plaintiff the said sum of Twenty-nine and
55 85/100 dollars ($29.85) costs, and that the defendant have execution therefor.

Dated, New York, August 3d, 1906.

CHAS. M. HOUGH,
Dist. Judge.

Approved as to form.
HENRY L. STIMSON,
United States Attorney, Attorney for Defendant.

Endorsed: "Judgment U. S. District Court S. D. of N. Y. Filed Aug. 6, 1906."

56 District Court of the United States for the Southern District of New York.

At Law.

DONA MARIA FRANCISCA O'REILLY DE CAMARA, Countess of Buena Vista, Plaintiff,

against

JOHN R. BROOKE, Major General, U. S. A., Defendant.

Petition for Writ of Error.

Now comes Dona Maria Francisca O'Reilly de Camara, Countess of Buena Vista, the plaintiff herein and says, that on or about the 3d day of August, 1906, this court entered judgment herein in favor of the defendant, John R. Brooke, Major General, U. S. A., and against the plaintiff in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

Dated New York, August 3d, 1906.

COUDERT BROTHERS,
Attorneys for Plaintiff, No. 71 Broadway, New York City.

Endorsed: Petition for writ of error. U. S. District Court. Filed Aug. 6, 1906. S. D. of N. Y.

57 THE UNITED STATES OF AMERICA, ss:

To John R. Brooke, Major General, U. S. A., Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden in the City of Washington, on the 1st day of September 1906, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Southern District of New York wherein Dona Maria Francisca O'Reilly de Camara, Countess of Buena Vista is plaintiff, and you are defendant, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and speedy justice be done in that behalf.

Given under my hand in the Borough of Manhattan, in the City of New York, in the District above mentioned, on the 3d day of August 1906, and of the Independence of the United States the one hundred and thirty-first.

C. M. HOUGH,
Judge of the District Court of the United States for the Southern District of New York.

Endorsed: "Citation. Service of a copy of the within is hereby admitted this 7th day of August, 1906. Henry L. Stimson attorney for d'f't. U. S. District Court. Filed Aug. 7, 1906. S. D. of N. Y."

58 District Court of the United States, Southern District of New York.

DONA MARIA FRANCISCA O'REILLY DE CAMARA, Countess of Buena Vista, Plaintiff in Error,
against
JOHN R. BROOKE, Major General, U. S. A., Defendant in Error.

Assignment of Errors.

And afterwards, to wit, on the 3d day of August 1906, before the Supreme Court of the United States, at the City of Washington, comes the plaintiff in error by Coudert Brothers, her attorneys, and says, that in the record of the proceedings aforesaid, there is a manifest error in this, to wit, that by the record aforesaid, it appears:

(1.) That the judgment aforesaid in form aforesaid given was given for the said defendant in error against the said plaintiff in error;

(2.) That the said judgment was not given for said plaintiff in error against the said defendant in error as demanded in the complaint;

(3.) That upon the facts as found herein the said District Court rendered judgment in favor of the defendant in error and against the plaintiff in error, whereas upon such facts as so found, judgment should have been rendered in favor of the plaintiff in error against the defendant in error.

(4.) That the said District Court held that by the order of the Secretary of War of December 24, 1900, the Act of Congress of March 4, 1901, and the Treaty with the Republic of Cuba of May 22, 1903, the Government of the United States ratified the action of the defendant in error complained of by the plaintiff in error.

(5.) That the said District Court held that by reason of ratification by the Government of the United States of the action of the
59 defendant in error herein complained of by the plaintiff in error herein, said plaintiff in error has no longer any right of action remaining against said defendant in error;

(6.) That the said District Court of the United States held that the said plaintiff in error had no cause of action against the said defendant in error;

(7.) That in and by said judgment the said District Court of the United States for the Southern District of New York, dismissed the complaint herein with costs.

And the plaintiff herein prays that the judgment aforesaid for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled and all together held for nothing, and that the plaintiff in error herein may be restored to all things which she has lost by occasion of the said judgment.

Dated, August 3d, 1906.

COUDERT BROTHERS,
Attorneys for Plaintiff in Error, No. 71 Broadway, Manhattan, N. Y.

Endorsed: "Assignment of Errors. U. S. District Court. Filed Aug. 6, 1906. S. D. of N. Y."

60 [Endorsed:] U. S. District Court, Southern District of New York. Dona Maria Francisca O'Reilly De Camara, Countess of Buena Vista, Plaintiff in Error, ag'st John R. Brooke, Major General U.S.A., Defendant in Error. Return to Writ of Error.

Endorsed on cover: File No. 20,372. S. New York, D. C. U. S. Term No. 407. Doña Maria Francisca O'Reilly de Camara, Countess of Buena Vista, Plaintiff in Error, *vs.* John R. Brooke, Major General, U. S. A. Filed September 26th, 1906. File No. 20,372.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1906. No. 407.

DONA MARIA FRANCISCA O'REILLY DE CAMARA, Countess of Buena Vista,
Plaintiff in Error,

vs.

JOHN R. BROOKE, Major-General, U. S. Army,
Defendant in Error.

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Motion to Advance.

And now, on the day of October, 1906, comes the Plaintiff-in-Error above named, by Frederic R. Coudert, Esq., her counsel, and moves this Honorable Court that the above entitled cause be advanced upon the docket, and set down for hearing upon such early day as to the Court may seem proper.

I.

This is a writ of error to the United States District Court for the Southern District of New York, to review a judgment of that Court, entered on the 3d day of August, 1906, dismissing plaintiff's complaint. This action is an action at law to

recover damages against the defendant for his wrongful act in depriving the plaintiff of her property without just cause. The property in question was an inheritable and alienable franchise to slaughter cattle in the City of Havana and to charge and receive a certain compensation per head therefor. The defendant, while acting as Military Governor of Cuba, during the United States' occupation after the Treaty of Paris, issued an order purporting to abolish the plaintiff's franchise and actually prevented her from exercising it and deprived her of its emoluments.

The action was first tried on a demurrer to the complaint, which was overruled (O'Reilly de Camara vs. Brooke, 135 Fed. Rep. 384). The defendant then answered over by leave of Court, and the action was tried on the merits. The facts were all specially found in accordance with plaintiff's contentions. The Court also held that plaintiff's franchise was private property and within the protection of the Treaty of Paris, and that defendant's act was not an exercise of police power and could not be justified as such. As matter of law, however, the Court held that a certain order of the Secretary of War, dated December 24, 1900, denying an application by plaintiff to revoke General Brooke's order, and the provisions of the "Platt Amendment" (31 U. S. Stat. 897, c. 803) "that all acts of the United States in Cuba during its military occupancy thereof are ratified and validated", constituted a ratification and approval by the United States Government of General Brooke's order and were effectual to relieve him of personal liability for his wrongful act, (O'Reilly de Camara vs. Brooke, 142 Fed. 858).

II.

The Court below laid down the rule that an authorization or ratification by the Government of an otherwise unlawful and wrongful act, committed by a public officer under color of his office, bars any action by the person aggrieved against such officer personally. It is to review this manifest error of law that the present writ of error is brought. This ruling of the Court was inconsistent with the views expressed in the opinion on the demurrer

(135 Fed. Rep., esp. at pp. 387–388). It is also contrary to numerous decisions of this Court, particularly the line of cases from Little vs. Barreme, 2 Cranch, 170, to Belknap vs. Schild, 161 U. S., 10.

III.

The question presented upon this writ of error is simply this: Does governmental authority or ratification relieve a government officer from personal liability for his own tortious acts, committed under color of his office? This is clearly a question in which the United States are concerned, since it involves directly the extent of their governmental power. It is also a question of great public interest and importance and is likely to arise repeatedly, especially in the outlying possessions of the United States, and in places where the United States may be in temporary occupation or control. In all such instances it is of the greatest importance that the powers and authority of the Government and of government officers, and the rights of the individual, should be clearly and positively defined by a controlling decision of this Court.

IV.

This motion is accordingly made to advance the cause for argument and determination at an early date.

Respectfully submitted,

FREDERIC R. COUDERT,
Counsel for Plaintiff in Error,
71 Broadway, N. Y.

I hereby join in the foregoing motion.

Attorney General.

No. 1024.

SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

DOÑA MARIA FRANCISCA O'REILLY DE CAMARA, COUNTESS OF BUENA VISTA,

Plaintiff in Error,

vs.

JOHN R. BROOKE, MAJOR GENERAL, U. S. A.,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

PAUL FULLER,
FREDERIC R. COUDERT,
CRAMMOND KENNEDY,
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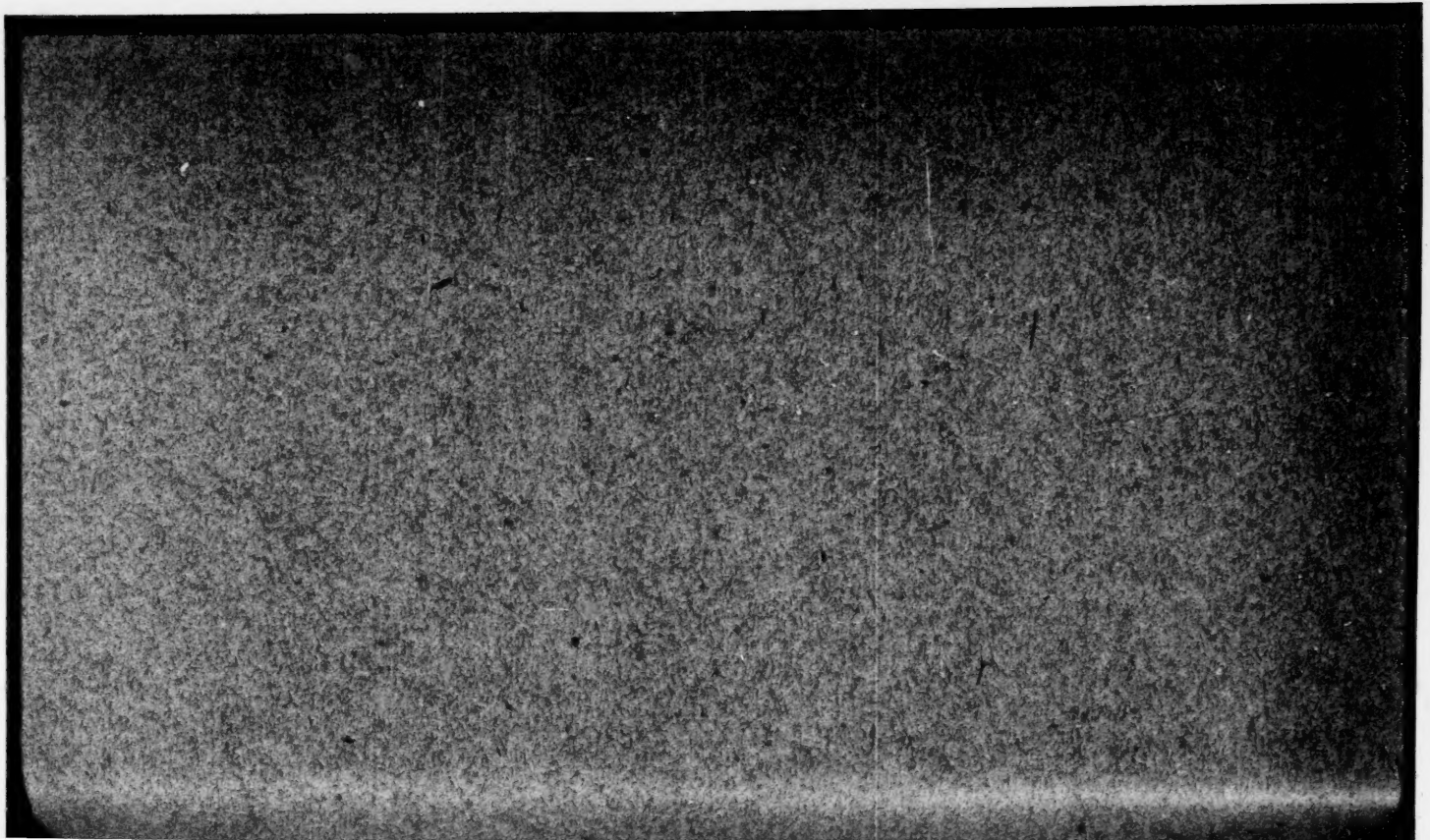

Supreme Court of the United States.

Doña Maria Francisca O'Reilly de Camara, Countess of Buena Vista, Plaintiff in Error, *vs.* John R. Brooke, Major General, U. S. A., Defendant in Error,	**Brief for Plaintiff in Error.**

Statement of the Case.

This is a writ of error to review a judgment of the United States District Court for the Southern District of New York, entered on August 6, 1906, dismissing plaintiff's complaint in an action brought by her against the defendant under U. S. Rev. Statutes, Section 563, Subd. 16th, conferring jurisdiction upon the District Court "of all suits brought by any alien for a tort 'only' in violation of the law of nations or of a treaty of the United States."

The action was begun in May, 1902. A demurrer interposed by the defendant was overruled by the Court on February 27, 1905 (O'Reilly de Cam-

ara *v.* Brooke, 135 Fed., 384). The defendant then answered over, the case was tried by the Court, and the judgment now sought to be reviewed was entered upon the Court's decision.

Statement of Facts.

The facts, which are substantially undisputed, are somewhat complicated, and must necessarily be set forth with some minuteness.

The plaintiff is an alien, a subject of the King of Spain. The defendant is a Major General in the United States Army, and at the time of the acts complained of was Military Governor of the Island of Cuba, during the former American occupation of that Island after the Treaty of Paris. The plaintiff was at that time the owner of a one-half interest in a certain alienable and inheritable franchise (in the nature of an incorporeal hereditament), which had formerly been appurtenant to a Spanish office in Cuba. Its history was as follows:

In 1785 the King of Spain confirmed to one Don Francisco Calvo de la Puerta the office of Alguacil Mayor of Havana, which he had already inherited and which appeared to have been in existence, by purchase from the Crown, since 1704. To this office was attached, among other things, for the purpose of making it remunerative and at the same time securing the performance of an important public service, a franchise involving the management of the municipal slaughter house of the City of Havana, and the right to receive three "reals" for each head of cattle killed within the city. Certain duties in connection with the in-

spection of meat and the like were imposed upon the holder of this office and franchise, and he also fulfilled certain governmental functions of an entirely separate character. (Rec., pp. 19-21).

This office of Alguacil Mayor and the franchises attached thereto, were under the law of Spain alienable and heritable, and constituted property. The franchise in question passed by sundry descents and mesne conveyances through numerous hands, and a half interest therein was held in May, 1899, by the plaintiff by right of inheritance. (Rec., pp. 18-25).

In 1859 the Spanish Government promulgated a decree providing for the gradual elimination of various hereditary offices in Cuba, including that of Alguacil Mayor of Havana. Compensation, however, was to be paid for such property rights as were connected therewith, and until such compensation was fixed and paid in the manner prescribed, the holders of these rights or franchises were to continue to exercise them and receive their emoluments (Rec., pp. 22, 23, Law of 1859).

In 1878, by a decree of the Governor General of Cuba, the office of Alguacil Mayor and its governmental functions were actually abolished, but the appurtenant slaughter house franchise, viz., the right to receive the emoluments in connection with the slaughtering of cattle and the duty of superintending such slaughtering, was continued pending the determination and payment of compensation. Such proceeding, although commenced under the law of 1859, had not been terminated at the time Spain relinquished the island and the United States took possession (Rec., pp. 23-25).

The slaughter-house in which the slaughtering was carried on belonged to the Municipality of Havana, and the plaintiff and her co-owner conducted and managed it, and received the prescribed emoluments. This was the situation at the time of the American occupation (Rec., p. 25).

It was plaintiff's duty to conduct the slaughter-house properly and keep it clean and wholesome, and she did so. There was, however, a creek adjacent to the slaughter-house emptying into Havana harbor, known as "Slaughter House Creek," which by long established custom received the offal from this and other slaughter-houses, and also a large amount of other sewage. This creek constituted a menace to the public health, which it was the duty of the public authorities to abate. During the early period of the American occupation, the Military Governor of Havana reported to the Governor of Cuba that he had demanded of the plaintiff that she should clear away the filth from Slaughter House Creek. It was no part of her duty to do so, and she does not appear to have taken any steps in the matter. She complied, however, with the order not to put any more offal into the canal leading to the creek, and by May, 1899, the nuisance was entirely abated, so far as anything for which the plaintiff was responsible was concerned. (Rec., pp. 25-26).

On May 20, 1899, General Ludlow, the Governor of Havana, made an order, to go into effect on June 1, 1899, purporting to abolish the O'Reilly slaughter-house franchise, and remitting the owners of this property right to the courts for the ascertainment and valuation thereof (Rec., p. 27),—a somewhat distorted or inverted variety of

condemnation proceeding, beginning with the seizure, and imposing the burden of instituting the court proceedings upon the property owner.

The owners protested and appealed to the defendant, General Brooke, then Military Governor of Cuba. He, thereafter, on August 10, 1899, made a further order, *superseding* that of General Ludlow. This order simply purported to abolish, under the pretext of public policy, the office of Alguacil Mayor of Havana (which had not been in existence as an *office* since 1878), together with the existing and actively exercised right or franchise of cattle slaughtering, and turned over these functions to the Municipality of Havana, which thereafter carried on the same business at the same slaughter-house and with the same manager as the plaintiff had done, and received the profits thereof. (Rec., pp. 18-29.)

Application was made to the Secretary of War to revoke General Brooke's order, but this was denied on or about December 28, 1900, on the ground that plaintiff's rights were not property, and that her franchise was an exercise of the police power, the right to exercise which terminated with Spain's sovereignty (Rec., p. 29).

In the decision upon the demurrer (O'Reilly de Camara *vs.* Brooke, 135 Fed., 384), the Court held that under the Spanish law applicable, plaintiff's franchise was property; that as such it was under the protection of the Treaty of Paris, and also of the President's order of July 13, 1898; that General Brooke's order was not an exercise of the police power, but was a tortious confiscation, and that he was liable for this trespass, independent of any liability on the part of the U. S. Government

upon any implied contract to pay for private property taken for public use.

Upon the trial substantially the same facts appeared as upon the demurrer. The Court took the same view as before in regard to the character of plaintiff's franchise as constituting "property" under the Treaty of Paris, and the character of General Brooke's act as a trespass upon plaintiff's rights, but held that the order of the Secretary of War, and the so-called "Platt Amendment" operated as a ratification by the United States Government of General Brooke's expropriatory order and relieved the defendant of individual liability.

Specification of Errors.

The plaintiff-in-error contends that the Court below erred:

1st. In deciding that the Government of the United States had ratified the act of defendant in abolishing plaintiff's franchise.

2nd. In deciding that such ratification (if any there was) relieved the defendant of individual liability.

3d. In dismissing the complaint instead of awarding judgment for the plaintiff upon the facts found.

Brief of the Argument.

The argument on behalf of the plaintiff-in-error may be summarized as follows:

I. Neither the order of the Secretary of War nor the "Platt Amendment" was a ratification by the United States of the tortious act of General Brooke.

II. In any event General Brooke is individually liable for his tortious act, irrespective of governmental direction or ratification.

III. General Brooke's act was a trespass upon plaintiff's property rights, and she was entitled to judgment.

POINTS.

I.

Neither the order of the Secretary of War, nor the "Platt Amendment" was a ratification by the United States of the tortious act of General Brooke.

A.

THE ORDER OF THE SECRETARY OF WAR.

This order was, in the first place, based upon a misconception of the nature of plaintiff's rights. The learned Secretary erroneously supposed that the slaughter-house franchise was "an exercise of the police power of the State," and that plaintiff had been "deprived of no property whatever"

(see Rec., p. 16). It now appears, and was so held by the District Court, that plaintiff's franchise was property (17th and 18th Findings, Rec., p. 25), and not a function of the police power (39th Finding, Rec., p. 29). The Secretary's order was therefore made not merely without that full knowledge of the facts requisite as a condition precedent to any effectual ratification, but even upon a positive misapprehension of the situation. As the *office* of Alguacil Mayor had ceased to exist at least as far back as 1878, his decision that the office died with Spanish sovereignty was in no wise *ad rem.*

Neither does the Secretary of War possess any such inherent and plenary powers as to make his order equivalent to a ratification by the United States of a tortious conversion of private property, committed by an army officer in time of peace. The United States Government has expressly recognized that "executive action by the War Department * * * is not due process of law" (22 Ops. Atty. Gen., p. 518).

Moreover, General Brooke's act was a violation of the President's order of July 13, 1898, which forbade the confiscation of private property except for cause, and also of the "Instructions for the Government of Armies of the United States in the Field" (Lieber's Code), which provide as follows:

§ 38. "Private property, unless forfeited by crimes or by offences of the owner, can be seized only by way of military necessity for the support or other benefit of the Army of the United States."

In the case at bar the seizure was not by way of military necessity, nor for the support or benefit of the army or of the United States. It only

affected the City of Havana. The Secretary of War had no power to authorize a violation of the President's specific order of July 13, 1898, or of the general instructions founded upon the general rules and usages of war recognized among civilized nations, promulgated long ago by direction of President Lincoln, and never withdrawn or countermanded.

B.

THE PLATT AMENDMENT.

This Act of Congress (31 U. S. Stat., p. 897) purported to ratify and validate "all acts of the United States in Cuba during its military occupancy thereof," and "all *lawful* rights acquired thereunder."

The first question that here arises is: Was General Brooke's order abolishing plaintiff's franchise an "act of the United States"? It is to be observed that the statute does not purport or attempt to ratify all acts of *the officers* of the United States in Cuba, but only the acts of the United States themselves. The distinction is important. By the Treaty of Paris, the United States undertook, so long as their occupation of Cuba should last, "to assume and discharge the obligations that may, under international law, result from the fact of its occupation, for the protection of life and property" (30 U. S. Stat., p. 1255). By the fourth section of the Joint Resolution of Congress, approved April 20, 1898, it had been provided and declared—"That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said Island except for the pacifica-

tion thereof, and asserts its determination when that is accomplished to leave the government and control of the Island to its people" (30 U. S. Stats., 738, 739). Spain relinquished her sovereignty in Cuba; the United States occupied the Island; pending the erection of a Cuban Government, it was necessary that there should be some executive power to carry on the ordinary functions of government; the United States assumed this quasi-trusteeship in accordance with the foregoing Resolution and the Treaty of Peace, and performed it through their military officers, acting in a civil capacity. Whatever was thus done to carry on the usual functions of civil administration and to protect life and property under the police power, was an "act of the United States," but where officers of the United States went beyond these bounds, and through mistake or otherwise trespassed upon private rights of person or property, their acts were no longer "acts of the United States," but were indivdual torts.

Hence General Brooke's order was not, even in terms, included in the ratification of the Platt Amendment. By the express limitation of that Statute to "lawful rights" acquired under the acts of the American administration of Cuban affairs, it clearly recognized that rights might be *claimed* thereunder which would not be lawful, and these it did not attempt to ratify. It did not purport to deal with a particular act of a military officer transferring something belonging to *A.* over to *B.*

This construction of the "Platt Amendment" does not leave it inoperative. The United States had collected Cuban revenues and expended them not merely on current administrative expenses, but also on permanent improvements such as

wharves and systems of sanitation. It might well be questioned how far such acts, necessarily imposing a heavier burden of taxation upon the permanent government, were properly within the functions of an *interim* government acting under the terms of a treaty and a resolution of Congress merely for pacification and the preservation of law and order until a permanent government should be established. But they were within the *power* of whatever might be the supreme governmental authority for the time being, whether provisional or permanent, and the "Platt Amendment," as incorporated into the treaty with Cuba, set at rest any questions there might have been as to their legality and binding effect upon the permanent government. The Amendment was intended to prevent succeeding governments from questioning the public governmental acts of the United States in exercising their rôle of pacification under the Joint Resolution and the Treaty, and not as a shield for the military agents whose acts might be brought in question before the courts.

If by any strained construction it is claimed that General Brooke's order was intended to be included in the ratification, such attempted ratification would be a nullity. The recent decision in U. S. *vs.* Heinzsen, 206 U. S., 370, marks the extreme limits to which this Court has gone in applying the doctrine of ratification to Congressional validation of acts committed without previous legal authority, and the entire reasoning of that case is based upon the theory that the act ratified was one which might lawfully have been authorized in the first instance. Now it is altogether clear in the case at bar, that Congress could not by any prior enactment have lawfully authorized General

Brooke to confiscate plaintiff's private property without cause and without compensation. The Treaty of Paris forbade, the universal rules of International Law forbade, and those constitutional provisions which go to the inherent limitations of the powers of the United States, wherever exercised, within or without their territorial jurisdiction, likewise forbade. As was well said by Secretary Root himself, in his report of November 29, 1899, "It is impossible that there should be any delegation of power by the people of the United States to any legislative, executive or judicial officer which should carry the right to violate these rules toward any one anywhere," and among "these rules" he expressly included "that private property shall not be taken for public use without compensation," and that no one should be deprived of property without due process of law. Congress cannot authorize any officer of the United States arbitrarily to confiscate private property anywhere, and cannot ratify what it could not authorize. This is one of the fundamental safeguards of liberty governing the actions of all organs or agencies of the Government. (De Lima *v.* Bidwell, 182 U. S., 1; Mankichi *v.* Hawaii, 190 U. S., 197.)

In regard to these fundamental limitations upon the power of Congress, this Court has spoken with no uncertain voice.

In Downes *vs.* Bidwell, 182 U. S., 244, Mr. Justice Brown called attention to the "clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place," and such as are operative only "throughout the United States" or among the several states (p. 277), and he included

"the right to personal liberty and individual property" among the "natural rights, enforced in the Constitution by prohibitions against interference with them" (p. 282). Mr. Justice White, with whom concurred Mr. Justice Shiras and Mr. Justice McKenna (and in substance Mr. Justice Gray), reaffirmed the same doctrine as follows: "Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen * * * which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot be under any circumstances transcended, because of the complete absence of power" (p. 294). The dissenting justices went even further in their views as to the binding force of all the limitations of the Constitution upon the powers of Congress in legislating upon any subject for any purpose and affecting any territory under the jurisdiction or control of the United States.

. At the time of the act complained of, Cuba was foreign territory, but under the control of the United States. (Neely vs. Henkel, 180 U. S., 109.) There was no war, and the American administration was a civil administration, although committed to military officers. Congress could no more authorize the arbitrary confiscation of private property in Cuba than in any other territory, whether domestic (incorporated or unincorporated), or foreign.

Other Spanish concessions in Cuba were expressly recognized by the U. S. Government (See 22 Ops. Atty. Gen., p. 518), and plaintiff's franchise, once determined to be property, was entitled to the same treatment.

As the occupation of Cuba was largely for the purpose of protecting property, the argument that Congress meant to ratify violations of property by those entrusted with that civilizing mission would seem to attribute to the Government of the United States motives scarcely consistent with the declarations of the Joint Resolution or the high professions contained in the Treaty, and the world-amazing unselfishness displayed in rendering that occupation so temporary and disinterested.

II.

In any event, General Brooke is individually liable for his tortious act, irrespective of governmental direction or ratification.

This has been the settled law of the United States since 1804, when this Court decided the case of Little *v.* Bareme, 2 Cranch., 170.

In this case, the captain of an American war vessel, acting under express instructions from the President, given under the supposed authority of an Act of Congress, was held personally liable in damages for having made a seizure not actually authorized by law. The Court said, by Marshall, C. J., "that the instructions cannot change the nature of the transaction, nor legalize an act which, without these instructions, would have been a plain trespass."

The same doctrine has been consistently followed in a long line of cases.

See The Charming Betsy, 2 Cranch, 64;
Shattuck *v.* Maley, 3 Cranch, 458;
Mitchell *vs.* Harmony, 13 How., 115;
Grisar *vs.* McDowell, 6 Wall., 363;
Cammeyer *vs.* Newton, 94 U. S., 225;
Bates *vs.* Clark, 95 U. S., 204;
Kilbourne *vs.* Thompson, 103 U. S., 168;
U. S. *vs.* Lee, 106 U. S., 196;
Virginia Coupon Cases, 114 U. S., 269;
In re Ayers, 123 U. S., 443;
Magahey *vs.* Virginia, 135 U. S., 662;
and Belknap *vs.* Schild, 161 U. S., 10.

This last case of itself is conclusive in favor of plaintiff's contention.

There the defendants, who were United States naval officers, acting under instructions of the Navy Department, had built and used a caisson gate at the Mare Island Navy Yard, which infringed plaintiff's patent. They were held liable, the Court saying: "The exemption of the United States from judicial process does not protect their officers and agents, civil or military, *in time of peace,* from being personally liable to an action of tort by a private person whose rights of property they have wrongfully invaded or injured, *even by authority of the United States.* Such officers or agents, *although acting under order of the United States,* are therefore personally liable * * *."

There is no valid distinction between the in-

fringement of intangible rights resulting from the ownership of a patent (which is a kind of franchise, and, for the time being, a monopoly) and the abolition or confiscation of rights growing out of any other franchise or monopoly, lawful under the *lex loci*.

This controlling case, although cited and followed by the learned District Judge in his opinion on the demurrer, was not referred to by him in his opinion on the trial, and his decision was based upon certain English cases, some of which are clearly at variance with the decisions of this Court.

These English cases are as follows:

The Rolla, 6 Robinson, 364 (1807).

In this case an American ship was seized for breach of a blockade declared by a British Commander at a distant port, without previous governmental instructions, but subsequently ratified by the British Government. But this blockade was a *war* measure, and might lawfully have been previously authorized. Hence the ratification was properly held tantamount to prior authority.

Buron vs. *Denman, 2 Exch., 166* (1848).

The facts in this case are sufficiently stated in Judge Holt's opinion. The following may be quoted from Baron Parke's charge to the jury (at p. 188), to show the *ratio decidendi*:

> "* * * I have conferred with my learned brethren, and they are decidedly of opinion that the ratification of the Crown, communicated as it has been in the present case, is equivalent to a prior command. I do not say that I dissent, but I express my concurrence in

their opinion with some doubt, because on reflection there appears to me a considerable distinction between the present case and the ordinary case of ratification by subsequent authority between private individuals. If an individual ratifies an act done on his behalf, the nature of the act remains unchanged, if is still a mere trespass, and the party injured has his option to sue either; if the Crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liability the person who commits the trespass."

The jury found that the Crown had ratified, and the action was subsequently settled and discontinued.

This extract shows the essential difference between the English and American doctrines, especially when compared with Chief Justice Marshall's decision that "the instructions cannot change the nature of the transaction, nor legalize an act which without those instructions would have been a plain trespass."

Secretary of State vs. *Kamachee Boye Sahaba, 13 Moore P. C., 22 (1859)*

This was a suit in equity by the senior widow of the Rajah of Tanjore against the East India Company, brought in the Supreme Court of Madras (equity side) to restrain the Company from seizing and holding the Rajah's private property, and to procure an account of the property seized, etc. A decree was made for the com-

plainant, and appeal was taken by the Secretary of State in Council of India, as representing the East India Company.

The Privy Council held that the East India Company had a dual capacity, (a) as a trading company, in which it was liable as a British subject, and (b) as exercising "on behalf of the Crown of Great Britain and subject to the control thereby provided, these delegated powers of sovereignty," viz., to acquire and govern territory, and to make peace or war with the native powers of India;

that "acts done in the execution of these sovereign powers were not subject to the control of the Municipal Courts, either of India or Great Britain";

that the act of seizure was an act of State over which the Supreme Court of Madras had no jurisdiction;

and that the acts of the individual agent physically making the seizure had been ratified by the Government, which was equivalent to a previous authority.

This decision was thus principally based upon the ground of lack of jurisdiction over the person of the defendant, when acting in its governmental capacity, just as this Court has no jurisdiction over one of the States of the Union at the suit of a private citizen.

Phillips vs. *Eyre, L. R., 6 Q. B. Cases, 1* (*1870*). (*On demurrer L. R., 4 Q. B. Cases, 225* (*1869.*)

In this case the acts complained of had been done in the suppression of an insurrection, and, as the Court intimated, might probably have been legally justified on that ground. The Act of rati-

fication and indemnity also specifically referred to the acts of the defendant, and the Court reiterated the doctrine of *Buron* vs. *Denman* that ratification by sovereign authority makes the act ratified an "Act of State," and that thereby "the original right of action is divested and all civil liability is extinguished."

The distinction between the case at bar and that of *Buron v. Denman,* so largely relied upon by the District Court in reaching its decision that the defendant was not liable by reason of ratification, is clearly pointed out by Dicey in his masterly work on the British Constitution:

> "Buron *v.* Denman, 2 Ex., 167, is sometimes cited as showing that obedience to the orders of the Crown is a legal justification to an officer for committing a breach of law, but the decision in that case does not, in any way, support the doctrine erroneously grounded upon it. What the judgment in Buron *v.* Denman shows is that an act done by an English military or naval officer, in a foreign country to a foreigner, in discharge of orders received from the Crown may be an act of war, but does not constitute any breach of law for which an action can be brought against the officer in an English Court. Compare Feather *v.* The Queen, 6 B. & S., 257, 295, *per Curiam.*"

It will probably scarcely be claimed by the Government in this case that the act of General Brooke in depriving the plaintiff of her property constituted an act of war against Cuba. Not only was there no war, but, on the contrary, the Government of the United States was, under the Joint Resolution of Congress and the Treaty of Peace, merely occupying Cuba for purposes of pacification.

Nor is it reasonable to suppose that, under any circumstances, the destruction of this ancient and time-honored franchise had any relation to the exercise of martial law.

It is suggested by the Court below that even though an American citizen would be protected against such an act by the provisions of the Constitution, this would have no application to an alien. (Rec., fol. 31.) But this Court has decided that an alien is as secure against confiscation as a citizen, and that the clause of the Constitution so providing applies to aliens and citizens alike. (Yick Wo *v.* Hopkins, 118 U. S., 356.)

The very Statute under which this action was brought expressly relates to suits by aliens. In the very early case of Little *v.* Bareme (*supra*), in which the opinion was written by Chief Justice Marshall, the claimants appear to have been aliens. So in the cases of The Charming Betsy and Maley *v.* Shattuck (*supra*), the claimant was a subject of the Danish Crown by naturalization.

The case referred to by Mr. Dicey, Feather *v.* The Queen, renders clear the distinction between an act of State in the English sense, and a case of confiscation by an officer of the Government. This case was as follows: A petition of right alleged the infringement by the Admiralty Commissioners of suppliant's patent. The Crown interposed a demurrer. The Court held that Letters Patent "do not preclude the Crown from the use of the invention protected by the patent even without the assent of or compensation made to the patentee," and that the petition of right would not lie, but intimated that action might be brought against the officers actually committing

the infringement. The Court, per Cockburn, C. J., said:

"Not only is there no precedent for a petition of right being entertained in respect of a wrong in the legal sense of the term, but, if the matter is considered with reference to principle, it becomes apparent that the proceeding by petition of right cannot be resorted to by the subject in the case of a tort. For it must be borne in mind that the petition of right, unlike a petition addressed to the grace and favour of the Sovereign, is founded on the violation of some right in respect of which, but for the immunity from all process with which the law surrounds the person of the Sovereign, a suit at law or equity could be maintained. The petition must therefore show on the face of it some ground of complaint which, but for the inability of the subject to sue the Sovereign, might be made the subject of a judicial proceeding. Now, apart altogether from the question of procedure, a petition of right in respect of a wrong, in the legal sense of the term, shows no right to legal redress against the Sovereign. For the maxim that the King can do no wrong applies to personal as well as to political wrongs; and not only to wrongs done personally by the Sovereign, if such a thing can be supposed to be possible, but to injuries done by a subject by the authority of the Sovereign. For, from the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorize wrong. For to authorize a wrong to be done is to do a wrong; inasmuch as the wrongful act, when done, becomes, in law, the act of him who directed or authorized it to be done. It follows that a petition of right which complains of a tortious act done by the Crown, or by a public servant by authority of the Crown, discloses no matter of complaint which can entitle the petitioner to redress. As in the eye of the law no such

wrong can be done, so, in law, no right to redress can arise; and the petition, therefore, which rests on such a foundation falls at once to the ground. Let it not, however, be supposed that a subject sustaining a legal wrong at the hands of a minister of the Crown is without a remedy. As the Sovereign cannot authorize wrong to be done, the authority of the Crown would afford no defence to an action brought for an illegal act committed by an officer of the Crown. The learned counsel for the suppliant rested part of his argument on the ground that there could be no remedy by action against an officer of state for an injury done by the authority of the Crown, but he altogether failed to make good that position. The case of *Buron v. Denman*, 2 Exch., 167, 188-9, which he cited in support of it, only shows that where an act injurious to a foreigner, and which might otherwise afford a ground of action, is done by a *British* subject, and the act is adopted by the government of this country, it becomes the act of the state, and the private right of action becomes merged in the international question which arises between our own government and that of the foreigner. The decision leaves the question as to the right of action between subject and subject wholly untouched. On the other hand, the case of the general warrants, *Money* v. *Leach* (3 Burr, 1742), and the cases of *Sutton* v. *Johnstone* (1 T. R., 493), and *Sutherland* v. *Murray*, there cited (1 T. R., at 538), are direct authorities that an action will lie for a tortious act notwithstanding it may have had the sanction of the highest authority in the state. But in our opinion *no authority is needed to establish that a servant of the Crown is responsible in law for a tortious act done to a fellow subject, though done by the authority of the Crown*—a position which appears to us to rest on principles which are too well settled to admit of question, and which are alike es-

> sential to uphold the dignity of the Crown on the one hand, and the rights and liberties of the subject on the other. We entertain no doubt that, if the effect of the letters patent had been to exclude the Crown from the use of the invention, an action could have been maintained by the patentee against any one by whom the invention had been used in the public service. On the other hand, as the infringement of a patent right constitutes a tort or wrong, in the proper sense of the term, and as no wrongful act can be alleged against the Crown, we are of opinion that, even if our decision of the first question had been in favor of the suppliant, a petition of right to the Crown would not be open to him as a means of redress. Our judgment must therefore be for the Crown."

This decision is entirely in line with our own statutes and decisions as to suits against the Government. In cases of tort the individual is liable in the civil courts.

Under our system of government, with no Crown prerogative, no sovereign officially incapable of wrong, and no omnipotent Parliament, there can be no "Act of State" except in accordance with law and within the fundamental limitations of governmental power. Any act not in accordance with law, and beyond those fundamental limits of power, is not an "Act of State", no matter with what forms it may be clothed, but is a mere personal tort of the individual who commits it.

As was clearly pointed out in the Virginia Coupon Cases (*supra*) an "Act of State" cannot be constituted merely by cloaking it with the solemn forms of legislative enactment. This court there said (114 U. S., at p. 288), speaking of a certain "legislative act of the government

of Virginia," on which the defendant relied: "It is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly in contemplation of law, has not done." Under the fundamental limitations of their nature and powers, the United States, whether acting through Congress or Executive Officers, could not confiscate plaintiff's property in time of peace, without cause and without compensation; therefore, in contemplation of law, they have not done so, any purported semblance of authority is a nullity, and, in the language of this Court in the case last cited, the defendant "stands, then, stripped of his official character, and confessing a personal violation of the plaintiff's rights for which he must personally answer."

Such recognition as the "Act of State" theory has received in the United States Courts has usually been in cases in which it was resorted to in order to hold the United States liable, not to relieve the officer of individual liability.

See

U. S. *vs.* Buchanan, Fed. Cas. No. 14678.

Wiggins *vs.* U. S., 3 Ct. of Claims, 412.

The Paquete Habana, 189 U. S., 453.

It is to be observed that the last case, and Lamar *vs.* Browne, 92 U. S., 189, cited therein, both involved acts of War, and not the powers of government officers in time of peace. Underhill *v.* Hernandez, 168 U. S., 250, also involved an act of war, which moreover was committed by a military commander of a *foreign* government, whose acts

were not deemed a proper subject for adjudication in the courts of another country. In the case at bar we seek an adjudication upon General Brooke's act of expropriation in the courts of his own country.

The present tendency in England is to confine the "Act of State doctrine" within the narrowest limits. It is there held that whether or not an act done under color of office *is* an "Act of State" is a justiciable question, within the jurisdiction of the Municipal Courts. See Musgrave *vs.* Pulido, L. R., 5 App. Cases (Privy Council), 102.

It is also held that direction by the executive officers of the Government is not, of itself, sufficient to exonerate a subordinate officer. See Raleigh *vs.* Goschen, L. R., 1898, 1 Ch. D., 73, per Romer, J., as follows: "It appears to me that if any person commits a trespass (I use that word advisedly as meaning a wrongful act or one not justifiable), he cannot escape liability for the offence, he cannot prevent himself being sued, merely because he acted in obedience to the order of the executive government, or of any officer of State."

Even the power of the Crown itself to authorize or ratify, is confined within constitutional bounds. This is well stated by Mr. W. Harrison Moore in his recent work on "Act of State in English Law" as follows (p. 23): "Moreover not merely is the jurisdiction of the Courts not ousted by the fact that the Act was done under royal authority, *but such authority is no defence unless the order was one which the Crown can lawfully give*; this is now one of the commonplaces of the law," and again (p. 46): "Trespass will lie against the servants of the Crown though

acting under the orders of the Crown, for they are individual wrongdoers, and their liability does not in any way legally involve the condemnation or loss of the Crown" (citing Lord Bellamont's Case, 2 Salk., 625).

A case which excellently illustrates the modern English doctrine is

Walker vs. Baird, L. R. 1892 App. Cases 491, (Privy Council).

This was an action by the owner of a lobster factory in Newfoundland against a Captain in the British Navy, in command of vessels in Newfoundland waters, for trespass in taking possession of plaintiff's factory, &c.

The defense was pleaded that the acts were done in pursuance of instructions from the Admiralty by command of the Crown, in carrying out the "*Modus Vivendi*" with France, and hence were "Acts and Matters of State" not cognizable by the Court.

Such defence was held insufficient in law and the defendant appealed.

The Privy Council said, by Herschell, L. C., in dismissing the appeal, "The learned Attorney-General * * * * conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals, whenever it was necessary in order to compel obedience to the provisions of a treaty."

Thus, under English law, even the obligation to carry out a treaty does not enable the Crown to authorize a trespass upon individual rights. While this case does not in express terms overrule

Buron vs. *Deman, supra,* it certainly declares a different doctrine.

See also

Sprigg *vs.* Sigeau, L. R., 1897, App. Cas., 238 (P. C.).

This was a review of the arbitrary arrest and imprisonment of a native chief in British Africa, under a special proclamation of the Colonial Governor. It was attempted to justify it as an "Act of State."

The Privy Council said, by Lord Watson:

> "The proclamation in question is described in the appellants' case as an act of State which is beyond the cognizance of any judicial tribunal. Whatever may have been meant by that expression, the character of the document is, on the face of it, abundantly clear. It is an edict dealing with matters administrative, judicial, legislative and executive, in terms which are beyond the competency of any authority except an irresponsible sovereign, or a supreme and unfettered legislature, or some person or body to whom their functions have been lawfully delegated."

Fortunately, the United States Constitution recognizes neither an "irresponsible sovereign" nor a "supreme and unfettered legislature."

See also

Campbell *vs.* Hall, Cowp., 204.

This was an action by the owner of a plantation in Granada to recover duties paid to defendant as collector, pursuant to a proclamation by the King fixing such duties.

Granada was ceded by treaty February 10, 1763. The treaty provided that the existing laws should continue "until His Majesty's further pleasure be known." By proclamation of October 7, 1763, the King declared that as soon as conditions permitted a colonial assembly would be summoned to legislate for the island. On April 9th, 1764, a Colonial Governor was commissioned, and authorized to summon such an assembly. By letters patent dated July 20, 1764, the duty in question was imposed.

Lord Mansfield held that by the proclamation of October 7, 1763, the King divested himself of his otherwise undoubted power to legislate for the colony, that the treaty continuing the old laws was "sacred and inviolable," and that after October 7, 1763, such laws could be changed only by the Colonial Assembly or the British Parliament, that the imposition of the new duties on July 20, 1764, was void, and that plaintiff should recover.

If the power of the British Crown over a conquered colony could be so limited by treaty and proclamation, surely the power of the Military Governor of Cuba, an island held in trust by the United States until its inhabitants should erect their own government, was equally limited by the treaty with Spain and the President's order of July 13th, 1898, by both of which the sanctity of private property was recognized and declared.

Cook *v.* Sprigg, 1899 App. Cas., 572.
West Rand Gold Mining Co. *vs.* The King, 1905, 2 K. B., 391,
and Saloman *v.* Secretary of State, 1906, 1 K. B., 613,

are not adverse authorities, as they were all cases in which it was attempted to hold the Government directly liable to private individuals upon rights claimed to rest upon treaties. It was held in substance that these were cases for "the ordinary course of diplomatic pressure" and not for judicial determination. They have nothing to do with the question of the individual liability of government officers for torts committed under color of authority.

In the absence of express authority or adoption by the Crown within its lawful powers, or by Parliament in its omnipotence, the responsibility of a government officer is the same in England as in the United States.

See Mostyn *vs.* Fabrigas, 1 Cowp., 161.

This was an action for assault and false imprisonment against the Governor of Minorca. The Court said by Mansfield, C. J., in a peculiarly apposite passage:

> "Therefore to lay down in an English Court of Justice such a monstrous proposition as that a governor acting by virtue of letters patent under the Great Seal, is accountable only to God, and his own conscience; that he is absolutely despotic and can spoil, plunder, and affect his Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained."

See also the earlier unreported cases reviewed by Lord Mansfield in his opinion.

This is strikingly similar to the American doc-

trine, as expressed in 1816 by Mr. Justice Story in

U. S. *vs.* Bevans, Fed. Cas., No. 14,-589, as follows:

> "This is emphatically a government of laws and not of men. The military and naval forces are created by the laws, and regulated by a code which ascertains their powers and enforces their duties. The officers and privates of the navy and the corps of marines when acting in the naval service, are bound by the rules and regulations enacted for the service by the Acts of Congress, and *whoever overleaps the power given to him is responsible for his conduct, either to the civil or military tribunals,* according as the acts fall within the cognizance of the one or the other."

Even if this "Act of State" doctrine were in full force in the jurisprudence of the United States, it could hardly rise to the dignity of an "Act of State" to seize without cause and without compensation the property of a private individual in time of peace, within the protection of a treaty, and turn it over to a municipal corporation purely for the financial benefit of the latter. (See Rec., p. 27.)

Neither the Military Governor nor the Secretary of War nor the President nor Congress can change such a spoliation into an "Act of State." It would come within the condemnation pronounced by Mr. Justice Chase of this Court in 1798 in Calder *v.* Bull, 3 Dall., 386, at 388, against "a law that takes property from A and gives it to B. It is against all reason and justice for a people to entrust a legislature with such powers. * * * The legislature * * * cannot * * *

violate the right of private property. To maintain that our federal or state legislature possesses such powers, if they had not been expressly restrained, would in my opinion be a political heresy, altogether inadmissible in our free republican governments."

Even "enemy property" in time of actual war, can be confiscated only by express authority of Congress (Brown *v.* U. S., 8 Cranch, 110; Conrad *v.* Maples, 96 U. S., 279), and in time of peace no power can authorize confiscation except as a penalty for crime.

III.

General Brooke's act was a trespass upon plaintiff's property rights and she was entitled to judgment.

The case was tried by the Court without a jury, which was waived in conformity with the State practice, and accordingly upon all questions of fact the decision of the trial judge is conclusive and "must be considered as equivalent to the verdict of a jury."

> Oleomargarine Cases, 195 U. S., 30, 65, 159.

It is therefore not open to dispute in this Court that under the law of Spain, which continued in force in Cuba during the American occupation, plaintiff's franchise was a property right which survived the withdrawal of the Spanish sov-

ereignty, that she performed her duty to keep the slaughter-house clean and wholesome; that any nuisance resulting from the discharge of offal from the slaughter-house into Slaughter-House Creek had been abated prior to General Brooke's order, and that his order was not a valid exercise of the police power. It must have been, therefore, an arbitrary confiscation, and the fact that his motives may have been subjectively meritorious does not justify the trespass. Upon these facts the District Court should have held—and upon the demurrer necessarily and properly did hold—that defendant was liable. It has been shown under Points I and II that the defence of ratification falls to the ground, and the decision upon the demurrer is thus still the law of the case. The grounds thereof are so fully and ably set forth in the opinion (135 Fed., 384) that any repetition would be superfluous. What is now sought to be reviewed is the error of law in holding otherwise upon the trial on the facts found, being the same facts which appeared upon the demurrer, with the addition of the so-called ratification, now shown to be of no avail.

Cases involving the abolition of Spanish public offices in Porto Rico (such as *Alvarez y Sanchez* v. *U. S.*, Court of Claims, Oct. 28, 1907) are not analogous. Plaintiff here did not hold an *office*, but a franchise. The office had been abolished long ago by Spain, but the franchise subsisted as a property right, like the franchise for a fishery, a ferry, a bridge, a turnpike, or any other public utility.

It is immaterial that the plaintiff may have an additional right of action on contract against the United States or any other party.

The authorities intimate that where officers of the Government tortiously take property for Government uses, the Government may, by recognizing the property taken as private property, become liable on an implied contract to pay for it, but the plaintiff could only avail herself of such right of action by waiving the individual tort. (U. S. *v.* Great Falls Mfg. Co., 112 U. S., 645.) This she is under no obligation to do.

There is thus nothing left in the case to relieve the defendant of individual liability, and upon the facts found plaintiff was entitled to judgment.

If it be argued that it is a hardship for a Government officer who has acted in good faith and with unselfish motives, in a position so high and responsible as that which was held by the defendant, to be mulcted in damages in such a case as this, the answer is that this is a matter to be adjusted between the officer and the Government of the United States. In discussing the question whether Captain Murray should be indemnified for the judgment rendered against him by this Court in the case of *The Charming Betsy*, the Secretary of the Navy, in his letter of December 26, 1804, to the chairman of the House Committee on Claims, said (American State Papers, Naval Affairs, Vol. I, pp. 128-133):

> "1st.—Was the recapture of the *Charming Betsy* warranted by a statute of Congress?
>
> "2d.—Was it warranted by the instructions which Captain Murray has received from the Executive?
>
> "The first was a question between Captain Murray and the owner of the vessel and cargo. *The second is a question between Captain Murray and the Government.*
>
> "Upon the first question, the courts of the United States having decided that the recap-

> ture was not authorized by any statute of Congress, Captain Murray has been adjudged to pay to the owner the damages sustained by him in consequence of such recapture.
>
> "Upon the second question the ultimate responsibility of the Government essentially depends; for, if the recapture was not authorized by the instructions from the Executive, Captain Murray has no claim upon the Government for indemnity. But if it was so authorized, then he is to be considered merely as an agent of the Government, and in such case the Government is, I trust, to be considered responsible for an act thus done by him in obedience to their orders."

Captain Murray (The Charming Betsy, *supra*) was indemnified by an act of Congress approved January 3, 1805 (6 U. S. Stats., 56); Captain Little (Little *v.* Barreme, *supra*) by an act approved January 17, 1807 (6 U. S. Stats., 63); and Lieutenant Maley (Shattuck *v.* Maley, *supra*) by an act approved February 2, 1813 (6 U. S. Stats., 116). In the last instance the appropriation was made payable directly to the plaintiff in the suit.

If a United States Government officer's act, whatever its legal character, is authorized or ratified by the Government, then the Government should—and, as it appears, usually does—indemnify him for any liability attaching thereto. But the person injured by such act, if tortious, is not and should not be thereby deprived of his remedy against the individual tort-feasor.

Conclusion.

The judgment should be reversed and the cause remanded to the District Court with instructions

to assess plaintiff's damages and enter judgment in her favor against the defendant therefor.

Dated November 15th, 1907.

Respectfully submitted,
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

Office Supreme Court, U. S.
FILED.
FEB 24 1908
JAMES H. McKENNEY,

No. 104.

DOÑA MARIA FRANCISCA O'REILLY DE CAMARA,
COUNTESS OF BUENA VISTA,
Plaintiff in Error,

vs.

JOHN R. BROOKE, Major General, U. S. A.
Defendant in Error.

BRIEF IN REPLY.

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Supreme Court of the United States,

OCTOBER TERM, 1907.

DOÑA MARIA FRANCISCA O'REILLY DE CAMARA, COUNTESS OF BUENA VISTA, Plaintiff in Error, *against* JOHN R. BROOKE, Major General, U. S. A., Defendant in Error.	No. 104.

BRIEF IN REPLY.

I.

Preliminary Statement.

The brief for the defendant in error discusses very fully certain propositions which have been settled as questions of fact by the Trial Court and do not seem to us open for argument here.

As questions of foreign law belong to the realm of fact, matters such as the discussion of the abolition by the Spanish laws of the office of Alguacil Mayor, would seem to be foreclosed. As they

have been reopened, however, and since the Spanish law seems to us to be quite plain on the points at issue, we will answer the propositions advanced, contenting ourselves here with merely calling the attention of the Honorable Court to the conclusiveness of the judgment below on these points.

The question of law upon which the decision below turned, viz., was there a valid ratification by the United States of the defendant's tort? is scarcely discussed, and upon that point we need add little to what was said in our original brief. Considering all questions of fact as settled, we there dealt wholly with the legal proposition upon which the decision of the District Court in dismissing the complaint was based.

As the testimony adduced on the trial, and the findings based thereon, did not materially vary from the facts as stated in the complaint, the learned Trial Judge virtually incorporated in his opinion by reference thereto the opinion rendered by him on the demurrer (135 Fed. Rep., 384), which, for the convenience of the Court, we print as an appendix hereto.

The divergent results reached in the two decisions were due to the modification of the learned Court's view as to the claim by defendant that the confirmation of his action by the Secretary of War and the article of the so-called "Platt Amendment" validating "all acts of the United States in Cuba during its military occupancy thereof" relieved him from liability in a civil action.

The decision of the District Court may be summarized as follows:

(1). Annexed to the office of Alguacil Mayor as an appurtenant property right, conces-

sion or franchise was the killing and carting, at a certain fixed compensation, of the cattle used in Havana.

(2). This right or franchise constituted property under the Spanish law and in this specific case had been recognized as such, proceedings having been actually instituted for its condemnation.

(3). The office itself, with all its political attributes, had been abolished by law and had ceased to exist at least as long ago as 1878, but the concession in connection with the slaughter house remained in full force and effect and could not be destroyed save by condemnation as in the case of any other private property.

(4). The act of General Brooke in depriving plaintiff of this concession and transferring it to the Municipality of Havana was a tort for which he was liable to respond in damages, but

(5). The approval of the Secretary of War (Rec., p. 29) and the article of the Platt Amendment validating and ratifying "all acts of the United States in Cuba during its military occupancy thereof" converted this otherwise tortious act into "an act of State," as defined by the English law, and hence

(6). The remedy of plaintiff for the deprivation of her property lies against the Government of the United States, which by adopting the wrong assumed the liability.

In answer to plaintiff's argument that the District Court erred in that the English Act of State doctrine was not part of our law and that even in England the doctrine had been so narrowed as to have no application to a situation such as that at bar, the defendant General Brooke maintains the following propositions as grounds

upon which he claims that the judgment should be sustained.

CONTENTIONS OF DEFENDANT IN ERROR.

I.—This Court has no jurisdiction to review the judgment of the District Court because the case was tried by the Court alone, a jury having been waived by consent of parties.

II.—A public office is a part of the sovereign authority or a vehicle for such authority and cannot survive when that sovereignty departs or is extinguished, hence the result of the war terminated the plaintiff's rights (Deft's. brief, p. 5).

Thus the protecting *aegis* of the Treaty could not extend to this defunct office of a "King's favorite" and General Brooke's order was merely the official registration of a death, not the extinguishment of a right.

III.—General Brooke "was a Government —legislative, executive, and judicial powers in one—not restrained in its operation by any Cuban Constitution, for none had emerged from chaos, *nor by the Constitution and laws of the United States, for they have no effect for a foreign country;* nor by the Treaty with Spain, for that merely agrees that the law of nations shall be respected; nor by the law of nations so far as this matter is in question, for that concerns international affairs, and not the internal Government of a country" (Deft's. Brief, p. 18).

On this theory the American Military Governor, exercising authority under a Treaty pro-

viding for "the pacification" of Cuba can know no limitation upon his sovereign authority over persons and property under his jurisdiction save that which may arise from the dictates of his own conscience. Such a limitation, we submit, human experience has found to be too elastic. The American Constitution was founded on a very different view and the decisions of this Court furnish no ground for any such theory of absolutism on the part of any governmental agents of the United States.

> IV.—The action of General Brooke may be sustained as an act of the Police Power in abolishing a nuisance. Moreover the mission of General Brooke was the "Democratization" of the island, a result which must not be obstructed by the retention of ancient institutions not fully "up to date." "Now, General Brooke understood this, and his order shows on its face that what he was doing was organizing the institutions of the island and its municipalities—making them Democratic and up to date. This was his duty, what he was there for, and not in violation of the law of nations" (Deft's. Brief, p. 28).

Consequently as such "evangel" of Democracy the defendant deprived Countess O'Reilly of the right to exercise the concession which had been in existence for more than a century and a half and which no Spanish Government, local or national, had suggested disturbing otherwise than by means of judicial condemnation and compensation.

> V.—The Government by ratifying his act relieved the defendant Brooke from all liability.

CONTENTIONS OF PLAINTIFF IN ERROR.

The propositions which the plaintiff in error respectfully submits in answer to the foregoing are:

I.—This Court has jurisdiction upon this writ of error because (a) the "Conformity Act" of 1872 enabled the District Court to try this case without a jury in conformity with the State practice in New York, and (b) upon the pleadings no real issues were raised, the essential facts being admitted by the answer.

II.—The office of Alguacil Mayor had long since ceased to exist (1878). What remained was a grant, franchise or concession which, under the Spanish law—as it would have been under any civilized legal system—was property. Defendant's argument as to the effects of territorial cession upon *public* office is wholly academic.

III.—The Treaty of Paris and the Law of Nations both recognize the inviolability of private property in time of peace. This treaty obligation defendant could not defy and his violation of such obligation was a tort. This is the English and American doctrine of "the Rule of Law." Moreover all applicable provisions of the United States Constitution limit the powers of the Government's agents wherever and whenever acting. The prohibitions against confiscation are not of mere local application to the States or "incorporated Territories," but go with the flag wherever it flies in actual sovereign dominion. This limitation is "fundamental" and of "natural right."

IV.—No question of Police Power was involved in this case nor was such a theory of justification set up until years after the act of confiscation. The official records and the Findings show that no nuisance arose by reason of the use made by plaintiff of her concession or franchise. Nor did the pacific mission of General Brooke require him to confiscate plaintiff's franchise. Neither hatred of monopoly, nor advanced views of socialistic Democracy, could override the plain terms of the Constitution, the Treaty, and the Law of Nations as to the sanctity of private property.

POINTS.

I.

This Court has jurisdiction to review the judgment of the District Court.

A. Effect of the Conformity Act of 1872.

The proposition of the defendant, that in cases where a jury has been waived by consent a judgment of the District Court cannot be here reviewed, is based upon the authority of the case of Rogers *v.* U. S., 141 U. S., 548, 556. In that case the Court of its own motion raised the point that, the parties having waived a jury and the facts having been found by the judge, there were no facts before the Court upon which questions of law could arise, hence the "judgment must be presumed to be right, and on that ground only affirmed."

This case, however, was decided without regard to the Conformity Act of 1872.

This court has thus held that by virtue of the Louisiana Conformity Act, facts found by the federal courts in that State must be regarded as judicially determined and equivalent to a special verdict, because such practice was permitted by the laws of Louisiana. Therefore, as a logically necessary conclusion, the general Conformity Act must have the same effect upon proceedings in federal courts in all states where a similar practice is permissible.

It is permissible in New York. (See Code of Civil Procedure, Sections 1008 and 1009):

Section 1008. *If trial by jury waived, action must be tried by the court.*

> "In an action triable by a jury, if the parties waive the trial, by a jury, of the issue of fact, the action must be tried by the court, without a jury; unless a reference is directed, in a case prescribed by law. * * *"

Section 1009. *Trial by jury; how waived.*

> "A party may waive his right to the trial of the issue of fact, by a jury, in any of the following modes:
>
> 1. By failing to appear at the trial.
>
> 2. By filing with the clerk a written waiver, signed by the attorney for the party.
>
> 3. By an oral consent in open court, entered in the minutes.
>
> 4. By moving the trial of the action, without a jury, or, if the adverse party so moves it, by failing to claim a trial by a jury, before the production of any evidence upon the trial."

In regard to the application of the Louisiana Conformity Act see further:

Mayhew *v.* Thatcher, 6 Wheaton, 128;
Parsons *v.* Armor, 3 Peters, 412;
Hyde *v.* Booream, 16 Peters, 169, 176;
Generes *v.* Bonnemer, 7 Wall., 564;
Avendano *v.* Gay, 8 Wall., 376;
Flanders *v.* Tweed, 9 Wall., 425.

These cases are to the general effect that upon a trial by the court without a jury, the findings of fact are conclusive and the only questions which can be presented to the Supreme Court for review are the rulings of the Court in the course of the trial, which must be brought up by a bill of exceptions, and the determination of the Court upon the facts found, which does not require a bill of exceptions, since it appears on the face of the record. (See also on this point Insurance Co. *v.* Boon, 95 U. S., 117, 124.)

It would seem wholly anomalous that a liberty of practice extended by special statute to one State should be sustained, and that, when a similar liberty is afterward extended by a general statute to all the States, it should be cut down or taken away by judicial construction.

It is therefore submitted that the Rogers case, decided as it was without reference to the Conformity Act, should not be followed as a controlling authority. Moreover the actual practice of this Court in this respect has changed, as appears from

The Oleomargarine Cases, 195 U. S., 27, 65, 159.

Here this Court, upon writ of error, reviewed upon the merits judgments entered in the District

Court in cases in which trial by jury had been waived by stipulation, and expressly held that "the consent to trial by the Court was not in conflict with the law" (p. 72), and that the findings of the Court were entitled to the same weight as the verdict of a jury, and were therefore "conclusive upon a question of fact unless plainly against the evidence" (p. 165). This was after the Court, of its own motion, had raised the question of jurisdiction (p. 67).

In the case at bar, the plaintiff in error is equally entitled to a review of the questions of law arising upon the facts found.

B. No substantial issues of fact were presented and the plaintiff was entitled to judgment upon the facts admitted in the pleadings.

Even aside from the Conformity Act, the waiver of a jury trial in this case does not prevent a review by this Court. The answer of the defendant did not raise any material issues of fact, but merely challenged the legal effect of the official acts and proceedings set forth in the complaint. The evidence which was presented was thus merely for the further information of the Court in regard to admitted facts and matters of public history and record of which judicial notice is taken.

Thus the questions presented for the consideration of the Court were purely questions of law, in any aspect of the case, and there was nothing to submit to a jury.

The following condensed analysis of the pleadings conclusively demonstrates this proposition:

	Complaint.	Answer.
Pars. 1 & 2	Description of parties.	Admitted.
" 3 & 4	Functions of office of Alguacil Mayor, and nature of slaughter-house franchise attached thereto.	Legal relation of franchise to office and of office to Spanish Crown denied. (Pars. 2 & 6.)
Par. 5	Succession of plaintiff to franchise.	Separation of franchise from office and existence of office in 1878 denied. (Pars. 2 & 3.) Not denied. (Par. 2.)
" 6	Decree of 1859. (Matter of public history).	Admitted as a fact.
" 7	Decree of 1878.	Legal effect only questioned. (Pars. 2 & 4.)
" 8	Spanish Civil Code provisions.	do. (Pars. 2 & 5).
Pars. 9 & 10	Purchase of ½ interest by Duplessis.	do. (Pars. 2 & 7).
Par. 11	Treaty provisions.	do. (Par. 8).
" 12	Status of defendant.	do. (Par. 8).
" 13	General Ludlow's order.	do. (Par. 8).
" 14	Defendant's order.	do. (Par. 9).
" 15	President's order of July 13/1898.	do. (Par. 10).
	No compensation to plaintiff.	Admitted (Par. 10).
" 16	Unlawful character of defendant's acts.	Denied (Par. 10). Question of Law only.

AFFIRMATIVE DEFENCES.

Par. 11. Ratification.	This is purely a question of law depending upon the legal effect of the Platt Amendment. So far as it involves Secretary Root's action, the matter is one of public record and judicial notice.
Par. 12. Partial Defence as to damages.	This only goes to the amount of damages, not to plaintiff's right to recover.
Par. 13. No injury to plaintiff.	This also goes to amount of damages only. The order of June 9, 1899, is a matter of public record.
Par. 14. Defence of Nuisance.	All the facts involved in this defence are matters of public record. Plaintiff's responsibility for the discharge of filth into the harbor is a question of law. The absence of any connection between plaintiff's franchise and this alleged nuisance is also a question of law.

The errors of the Trial Court in determining these questions of law may therefore be reviewed by this Court upon this writ of error, even if the Findings should not be regarded as facts judicially ascertained. The details, added by the Findings to the facts admitted by the pleadings, may, so far as they are material to the questions at bar,

all be found in public records of which this Court takes judicial notice.

II.

The office of Alguacil Mayor was abolished by the Spanish law in 1878. The right, concession, or franchise confiscated by General Brooke had long been dissociated from the office and was private property.

The history of the O'Reilly concession is fully set forth in the Findings of the Court below, and need here be merely summarized.

In the year 1728 Don Sebastian Calvo de la Puerta purchased at public auction with the consent and approval of the Spanish Crown the office of High Sheriff (or Alguacil Mayor) of Havana (for the history of such offices in Spain and her Dominions see Alcubilla, Diccionario, etc., Art. Oficios y Derechos Enajenados). An account of this family and their illustrious services may be found in Pezeula, Diccionario Geografico, etc., de Cuba, Art. Calvo de la Puerta. Upon his death the office descended to his grandson Don Francisco Calvo de la Puerta and the transfer was approved by the Royal patent of May 22, 1785, set out in full in the Record (p. 19). The male issue of the line having become extinct, in course of time the office passed into the hands of Count O'Reilly, the husband of the High Sheriff's

daughter. It is a noteworthy coincidence that this Count O'Reilly had been the Governor of Louisiana and had introduced the Spanish system of municipal organization into that Colony. (Gayarré, History of Louisiana, Chap. I.) The office descended to his heirs and successors until its abolition in 1878. The slaughter house concession passed to the present plaintiff and was exercised by her until she was deprived thereof by General Brooke.

The duties of High Sheriff were of a quasi-judicial nature very similar to those of the Sheriff under the English common law, and were part of the executive machinery of the Courts. The Sheriff served writs, for which he received fixed fees, and also had charge of the public prison (Rec., p. 33). He was also a "*Regidor*" of the City, the two offices being united in the patent conferring them (Rec., p. 3, fol. 33). This office was consequently termed a "dual office" (do. fol. 40).

The old Municipal Councils were composed of two elements, the "*Regidores*" chosen by the people and the "*Regidores perpetuos,*" or holders of hereditary offices which carried with them the right to sit in the Council.

Early in the last century it became the policy of the Spanish Governments to abolish hereditary offices, substituting therefore elective offices. The policy was embodied in the law of 1859 (Rec., fol. 39 *et seq.*) which was specially applied to Cuba.

This law provided a system for appraising the offices with a view to their condemnation. They were to be valued, and when paid for should cease to exist.

The office of Alguacil Mayor of Havana was especially referred to (Rec., fol. 40) and under

this law proceedings for condemnation were instituted but were never completed (Rec., fol. 40) probably owing to lack of funds.

Actuated, evidently, by a desire to put an end to the hereditary officials and to substitute elective ones, thus apparently forestalling the republicanizing mission of General Brooke so emphasized by his learned counsel, the decree of 1878 was issued by the Governor General (Rec., fol. 42).

This law abolished the office of Alguacil Mayor, which office ceased to "be counted among the offices of the Municipal council."

The right to continue in the exercise of the slaughter house privilege, however, remained and was exercised by Count O'Reilly and the plaintiff until the order of the defendant of August 10, 1899 (Rec., fol. 49), made it impossible further to continue it. In 1895 a one-half interest in the franchise was purchased at judicial sale by one Duplessis in an action to recover a debt due by the estate of Count O'Reilly (Rec., fol. 44).

Counsel for General Brooke contend that while the office of *regidor* was abolished by the law of 1878 that of Alguacil Mayor remained in existence.

> "The decree of 1878 does not disturb the office of Alguacil Mayor, but the other office of *regidor*, (town Councilman). Accordingly, the office of Alguacil Mayor survived that decree and existed at the moment Spanish sovereignty ceased" (Brief, p. 8).

This proposition is negatived by

(1) the Findings,

(2) the very terms of the law itself,

(3) the Spanish Civil Code,

(4) the official report of the defendant himself, of which this Court will take judicial notice.

The object of the legislation of 1859 and 1878 had been the abolition of the hereditary office. The right to a seat in the Municipal Council was simply one aspect of the office of Alguacil Mayor.

The law of 1859 provided for a method of condemnation, in the meantime maintaining the office, while, on the other hand, the edict of 1878, which in terms refers to and is complementary to that law, abolishes the office while maintaining the concessions or franchises in the nature of private property which were appurtenant to it.

The service of writs from 1879 to 1885 devolved, as had always been the case in locations where there were no high sheriffs, upon other officials, such as clerks of the Courts or constables or bailiffs. After 1885 this system was codified in Articles 262, 273, and 1440 of the Law of Civil Procedure.

In the language of General Ludlow's report, transmitted by Gen. Brooke, the office was "long since extinct." What remained was the "hereditary concession or right" mentioned in that official document.

We quote therefrom as follows:

> "3. Revenues from the slaughterhouses.—The city owns two slaughterhouses in which, until June 9, 1899, all slaughtering in the city was required to be done. Since this date the decree of the military governor of Cuba has

allowed the establishment of private slaughterhouses, but none have yet been established in the City of Havana so far as the Commission knows. *The commission investigated the management of the slaughterhouses and found it businesslike and efficient.* In the smaller house, where only pigs and sheep were killed, the rates charged seemed inadequate to the service performed, and the commission recommended a new tariff. In this slaughterhouse all the work was done by the city employees from the time the animals came there until the dressed meat was delivered to the butcher shops, and the city received all the fees.

In the larger slaughterhouse, where only cattle are killed, the commission found that the descendants of the Count O'Reilly y de Buena Vista held a monopoly on the right of carrying the dressed beef to the butcher shops, for which they were allowed to charge 50 cents a carcass. This monopoly originated in 1706 as a crown grant to the high constable (alguacil mayor) of the city of Havana, as a partial payment for the services which he rendered in that office, and as a sanitary measure. *This office has long ceased to exist.*

After careful investigation of the origin and legal status of this right and acting upon legal advice the commission recommended that the city assume charge of the cartage of meat at once and reduce the price to 25 or 30 cents a carcass. In pursuance of the recommendation of the commission on May 20, 1899, you [Gen. Ludlow] terminated the *concession* of the O'Reilly family. and directed the city to procure the necessary wagons and animals to carry the beef to the butcher shops, beginning with June 1, 1899, and reserved to the owners, grantees, or lessees of this privilege the right to seek in the courts the estimation and valuation of such equities or legal rights

as they might believe themselves to possess. Appeal was taken by the proprietors to the military governor of Cuba, who declined to intervene in the matter. The commission understands that a further appeal is being taken to the United States Government at Washington. *Since June 1, 1899, the city has continued to employ the sub-contractor to whom the owners of the concession had leased their privilege, on the same terms for which he had previously performed these services for the owners, and the commission understands that it is the intention of the city as soon as possible to procure the necessary wagons and animals to do this work itself.* At present the city revenues have been increased about $10,000 a year by this change, and under the proposed arrangements they will be still further increased.

The commission further found that all but three of the cattle corrals and slaughter pens of the larger slaughterhouse were owned by butchers under a decree of the city council passed August 13, 1894. *The commission made a thorough investigation of the origin and nature of this monopoly, and after taking legal advice considered that the monopoly had been forfeited* and recommended that it be formally abolished and that the cattle corrals and slaughtering pens be thrown open freely to the use of any person who desired to slaughter cattle.

Under date of July 22, 1899, the mayor of the city issued a decree in which he took full advantage of the rates to be collected by the city in the public and private slaughterhouses in accordince with the decree of the military governor of Cuba mentioned above. This decree of the mayor also contained an entirely new set of rules for the government of the public slaughterhouse, *by which the city continued to carry the dressed beef to the butcher*

shops, and by which the administrator in charge of the public slaughterhouse was authorized to assign the corrals and slaughtering pens to butchers having cattle to slaughter in his own discretion.

(Report of Havana Finance Committee to Gen. Ludlow, contained in Report of the War Department, 1899, Vol. I, Part 3, page 287).

That the fact of being a monopoly did not justify defendant in his action is clear from the terms of the advice of the Attorney General to the Secretary of War in June, 1899:

"It is easy to say that monopolies are odi-
"ous, but there are concessions which amount
"to monopolies which are lawful and cannot
"be disturbed, except by a violation of the
"public faith. * * * With the wisdom of
"such arrangements for exclusive franchises
"the Executive Departments are not con-
"cerned. The grants are made in this coun-
"try by Congress and in other countries by
"the constituted sovereign authority. *It is the*
"duty of those who administer the govern-
"ment to deal with the conditions as they
"find them, and to see that legal rights of
"every nature are respected. * * * Con-
"cessions of this kind, which carry with them
"exclusive rights for a period of years, con-
"stitute property of which the concessionary
"can no more be deprived arbitrarily and
"without lawful reason than it can be de-
"prived of its personal tangible assets."

(22 Opinions Atty. General, pp. 516, 518).

The general proposition that an office as such falls with the sovereignty from which it emanated and one of whose manifestations or agencies it is, is one from which we do not feel obliged to dissent.

The Captain General of Cuba doubtless became *functus officio* when the Spanish flag at Havana was struck, likewise the judicial and administrative officers ceased to represent Spanish rule and could only continue with the consent of the United States to act at all, but all this, however true, can have no bearing here.

Our position is that the plaintiff was not exercising any governmental function, nor holding any office, but was exercising a private right.

The case of Sanchez *v.* The United States can have no bearing here since the Court of Claims held that Spanish office-holders in Porto Rico had no claim against the United States because its conquests had incidentally caused their offices to lapse. The plaintiff here was exercising a mere private business under a lawful concession, and in territory not ceded to the United States, but merely under its protection.

That this was the exact situation was recognized by the Municipality itself, as appears from the Report of the Havana Finance Committee made to General Ludlow in May, 1899 (War Department Report of 1899, Vol. 1, Part 3, p. 287).

It there appears that certain cattle dealers had made complaint in 1881 to the Ayuntamiento as regards the fees charged by the owners of the O'Reilly concession:

> "In view of the petition presented on the 5th of September, 1881, by Don Augustin

Alonzo and other meat dealers, this corporation in ordinary session on the 19th of the same month, agreed to present the case to the Civil Governor of the Province forwarding to him the *expedientes* regarding the subject. The Provincial Commission issued its report, which was approved by the Governor, proposing that the Ayuntamiento should be directed to abide by the commands of the Royal Decrees of June 27, 1785, of February 22, 1787, and of the provisions of the Governor General's resolution of November 2, 1878, published in the *Gaceta* of the 5th of the same month and year, and, therefore [to comply] with articles 98, 99 and 100 of the Royal Decree of July 27, 1859, by which Count O'Reilly was to be maintained in the possession and enjoyment [not of the *office* of Alguacil Mayor but] *of the emoluments assigned by said sovereign dispositions to his ancestors and heirs regarding the said 'derecho punalada,' until proper indemnification should be made;* to which end it urged that the Ayuntamiento should draw up the proper paper (*expediente*), or, if the same had already been drawn up, *it should be considered as final.* In session of the 3rd of April, 1882, it was agreed to comply with the resolution of the Civil Governor of the Province" (See Exhibit C annexed to said Report).

It is argued by defendant that although certain offices might have been considered as property under the Spanish law as between the grantee and Spain, yet when Spanish sovereignty fell the office went with it, and although the erstwhile incumbent might have a claim against Spain he could fasten no liability upon the United States. Extracts from the discussions between the Commissioners

leading up to the making of the Treaty are cited to show that this Government did not assume any of the debts of Spain. All such discussion is irrelevant. One who held a public office under Spanish sovereignty held it subject to Spain's ability to hold the territory in which such office was exercised. This was as true of a purchased office, as of an elective one. It was this skillful begging of the real question by the attempted resuscitation of an old Spanish office which had died a generation before, that misled the Secretary of War when the matter was before him, into holding that:

> "The petitioner has been deprived of no property whatever. The office, right or privilege which she had acquired by inheritance was in its nature terminable with the termination of the sovereignty on which it depended" (Rec., fol. 28).

It is ever the ghost of the old alienated office which the defendant seeks to invoke from the Limbo to which the Law of 1878 consigned it.

The Countess O'Reilly never was Sheriff, she never served writs or managed jails; she never sat in the Municipal Councils; her business involved the exercise of no public functions. She merely managed the slaughter house service and the transportation of meats. In performing such service she employed some seventy workmen, fifty oxen and more than twenty carts (Rec., fol. 8).

Is such a business a public governmental function? Does it partake of the nature of a public office any more than (if as much as) a railroad or cable concession. Yet such concessions, although much more recent, have been treated as property and protected by the Intervening Government. The Attorney General of the United

States held, in regard to the question as to whether a cable concession of Cuba granted shortly before the Spanish evacuation had been obtained through fraud, as follows:

> "Vested rights which are property ought not to be taken from anyone, even upon charges of fraud, except by due process of law.
>
> "It is the function of the Government to prevent so far as possible, all infringement of the vested rights of others.
>
> "Mr. Mackay, through his company, proposes to set up a competitive cable line, which he concedes will greatly injure the business of the Western Union Company, and although the latter Company produces a grant which, on its face, gives it an exclusive right for a period which has not expired, he requests this Government to stand idly by while he does, with the acquiescence of the United States, *the very thing which the Government of Spain, our predecessor in the sovereignty of Cuba, solemnly agreed not to do or permit to be done*" (XXII, Ops. Atty.-Gen., 514, 518).

Is a right to slaughter cattle and transport the carcasses to the butchers' shops of the city any more a governmental office, a sovereign attribute which "falls in the track of war" than a contract to pave the streets of the city? Conceivably a city may pave its own streets, but when it contracts to have some one else do it, such contract or concession becomes property.

The Attorney General in such a case said:

> "If Michael J. Dady and Co. had, at the "time the Treaty of Paris was signed, any "rights under their alleged contract which "can properly be called vested rights, those "rights are undoubtedly preserved by the "terms of the Treaty (p. 529).

"If the authorities were convinced that "Michael J. Dady & Co. had a vested right "or a complete contract it would be within "their lawful province to suspend its execu- "tion if they thought the public health or "other interests required.

"Of course such an interference with the "exercise of a vested contract right would "involve the payment hereafter of legal "damage on account of such interference, but "the public good would be the higher law "and would justify the interference. * * *

"A city may suspend or entirely abandon "a project, although covered by a valid con- "tract, *subject only to the right of the con- "tractor, if damaged, to recover just compen- "sation"* (XXII, Ops. Atty.-Gen., 529-30).

These utterances are in accord with what this Court has said in regard to the relation of our Government to Cuba:

"It became its duty under international "law and pending the pacification of the "Island, to protect in all appropriate legal "modes the lives, the liberty and the property "of all those who submitted to the authority "of the representatives of this country."

Neely *v.* Henkel, 180 U. S., 109, 121.

Had the right to pave Havana's streets at so much a yard been a right appurtenant to the office of Alguacil Mayor, which the Spanish law had recognized as a franchise surviving the destruction of the office, would it have been any the less a vested right than if created by an independent grant or contract?

When in 1895 Dr. Duplessis purchased one-half of this concession, he was buying a piece of property which was no more a mere incident of Spain's

sovereignty over Cuba than the cable or street paving concessions.

The fact that the service is now performed by the Municipality itself does not tend to prove that the service is governmental. Any kind of business may and often is conducted by a Municipality, such as gas, railway, ferry, telephone service, but such functions are not governmental in the sense that they cannot also be the subject of private property. The rights of Mackay to lay wires and of Dady to pave streets are fundamentally different from the right of Blanco to be Governor General.

Some European Governments monopolize the tobacco and match business as a means of revenue, but we do not treat a tobacconist or match manufacturer as the holder of an office.

It is failure to recognize this inherent difference between governmental functions and matters which are in their nature the subject of private business which renders the defendant's reasoning fallacious. A State or City may indeed engage in a private business but that does not change the nature of such business.

South Carolina *v.* U. S., 199 U. S., 437, 463.

The sole question here is this:

The person holding the position of Alguacil Mayor had two classes of rights and duties; one which was of public law alone and incumbent upon him as a representative of the Spanish body politic; the other which in their nature belonged to the domain of private business. The law deprived him of one but left him the other. Is not the latter as much entitled to protection as though the office had never existed?

This is recognized in the order of General Ludlow, Governor of Havana, for he made special provision for compensation:

> "That the present owners, proprietors, grantees, or lessees of the abrogated privilege may seek in the Courts the establishment and valuation of such equities or legal rights as they may believe themselves to possess" (Rec., fol. 48).

This order is at least only condemnatory, not confiscatory, although it inverts the usual order of procedure.

But General Brooke's order is frankly confiscatory and purports to be a measure of public policy,—"in view of the condition of affairs created in this Island by the cessation of Spanish Sovereignty, the old alienated office, etc., together with all rights, etc., are hereby abolished" (Rec., fol. 49).

As General Brooke had already "suspended" the "prosecution of all claims against municipalities," the plaintiff could do nothing in the courts of Cuba (War Dept. Report for 1899, Vol. 1, Part 6, p. 28).

It was doubtless failure to realize that his abolition of the office had been anticipated by the Governor General of Cuba more than twenty years before that led General Brooke to take the action he did.

In so doing he erroneously though presumably patriotically supposed he was continuing to do what he had so gallantly done during the war with Spain, viz., root out the last vestiges of Spanish sovereignty from the Western Hemisphere.

If the plaintiff's concession were a public office, it had indeed departed from Havana before General Brooke arrived and his order was *brutum fulmen;* if it were private property, no order of his could take it away without compensation. That it was the latter, we respectfully submit, the record herein, the history of the Concession, the Spanish law and the defendant's own reports amply demonstrate.

III.

The Treaty of Paris protected all private property in Cuba. The defendant was further limited by the Constitution and by the rules of International Law in his dealing with private rights.

The learned counsel for defendant seem to contend that the provisions of the Treaty as to the protection of property are neither clear nor strong.

> "The Treaty accordingly has no peculiarly strong provisions for the protection of property. Article I is vague enough." (Deft's. Brief, p. 16.)

Yet the terms of the Treaty seem singularly free from ambiguity or vagueness. The United States is to discharge the obligations that may result "from the fact of its occupation for the protection of life and property" and "the relinquishment of Spanish Sovereignty shall not be held to

impair the property or rights which by law belong to the *peaceful possession of property of all kinds* of private individuals of whatever nationality such individual shall be". (Rec., fol. 9.)

This is clear enough and is after all but a codification of definite rules of International Law, which this Court has again and again proclaimed to be a part of our law.

> "In following the course of the Law of Na-
> "tions, this court has declared, that even in
> "case of conquests the conqueror does no
> "more than displace the sovereign, and as-
> "sume dominion over the country. A cession
> "of territory is never understood to be a
> "cession of the property of the inhabitants.
> "The king cedes only that which belongs to
> "him; lands which he had previously granted
> "were not his to cede. * * *
>
> "*No construction of a treaty which would*
> "*impair that security to private property,*
> "*which the laws and usages of nations would,*
> "*without express stipulation, have conferred,*
> "*would seem to be admissible further than its*
> "*positive words require.*" * * *
>
> "Those things which the king gives to any
> "one cannot be taken from him by the king or
> "any one else, without some fault of his; he
> "shall dispose of them at his will, as of any
> "other things belonging to him."
>
> Strother *v.* Lucas, 12 Pet., 410, 438, 444.

> "*Spain had the power to make grants*
> "*founded on any consideration, and subject*
> "*to any restrictions, within her dominions; if*
> "*a grant was binding on that government, it*
> "*was so on the United States, the successor of*
> "*Spain.*"
>
> U. S. *v.* Clarke, 16 Pet., 228.

"By the cession of California to the United "States, the rights of the inhabitants to their "property were not affected. They remained "as before. Political jurisdiction and sover- "eignty over the territory and public property "alone passed to the United States."

More *v.* Steinbach, 127 U. S., 70, 78; citing U. S. *v.* Perchman, 7 Pet., 51, 87.

Text Writers confirm these principles.

"The Dartmouth College Case, 4 Wheat., "518, establishes conformably to the recog- "nized principles of public law, that a gov- "ernment inherits and is bound by the obliga- "tions of its predecessor, even when it has "arisen through their overthrow and rests "upon a different basis; or more accurately "speaking that each successive government "represents the nation which is consequently "bound to fulfil the contracts it has made, "notwithstanding any changes in the laws or "institutions."

1 Hare's American Const. Law, 599.

"A change of sovereignty is not in modern "times permitted to effect any change in the "rights of private property. * * * What "was the property of the individual before, "remains private property, notwithstanding "the conquest or cession."

Halleck's Int. Law, 1st ed., chap. 33, sec. 24.

And Halleck then quotes this passage from Mr. Chief Justice Marshall:

"The modern usage of nations, which has "become law, would be violated; that sense of

"justice and of right which is acknowledged "and felt by the whole civilized world, would "be outraged, if private property should be "generally confiscated, and private rights an- "nulled."

"Immunities granted for particular reas- "ons, or with a view to some return, partake "of the nature of a burthensome contract, and "can only be revoked in case of abuse, or "when they become incompatible with the "safety of the state. And if they be sup- "pressed on this latter account, an indemnifi- "cation is due to those who enjoyed them."

Vattel, Book II, Chap. XIV, § 217.

And our diplomatic archives show that this Government has exacted compliance with this doctrine.

Secretary Bayard stated the policy of our Government as follows:

"The Government of the United States, "therefore, holds that titles derived from a "duly constituted prior foreign Government "to which it has succeeded are 'consecrated "by the laws of nations.' "

He further declared that

"for the new sovereign to vacate titles be- "cause they could not have been lawfully "granted if its own law had at the time pre- "vailed, is to strike at that principle of his- "torical municipal continuity of Government "which is at the basis of international law."

1 Wharton's Inter. Law Dig., pp. 16, 17.

In the order of the President of July 13, 1898, it is said:

"Private property whether belonging to individuals or corporations is to be respected and can be confiscated only for cause."

We confess to some degree of surprise to find counsel seeking to qualify the broad duty of full protection to private property which was recognized as peculiarly binding on the United States in its mission of pacification in Cuba, by all branches of the Government.

There seems further to be a serious misconception of repeated decisions of this Court in the view that General Brooke in Cuba was not "restrained" by "the Constitution and laws of the United States, for they have no effect for a foreign country." (Deft's Brief, p. 18).

Mr. Secretary Root took a very different view. In his report (1899), as Secretary of War, he said:

"The people of Porto Rico are entitled to "demand that they shall not be deprived of "life, liberty or property without due pro- "cess of law, that private property shall not "be taken for public use without compensa- "tion, that no law shall be passed impairing "the obligations of contracts, etc., *because* "*our Nation has declared these to be rights* "*belonging to all men. Observance of them* "*is a part of the nature of our government.* "*It is impossible that there should be any* "*delegation of power by the people of the* "*United States to any legislative, executive* "*or judicial officer which should carry the* "*right to violate these rules toward anyone* "*anywhere; and there is an implied contract* "*on the part of the people of the United* "*States with every man who voluntarily sub-* "*mits himself or is submitted to our domin-* "*ion, that they shall be observed as between* "*our government and him.* * * * (p. 25).

"The control which we are exercising in "trust for the people of Cuba should not be, "and of course will not be, continued any "longer than is necessary to enable that "people to establish a suitable government, "to which the control shall be transferred "* * *. When that government is estab- "lished it will be its duty and right to solve 'for Cuba the problems above discussed in re- "gard to Porto Rico." (pp. 31-32.)

(War Dept. Rept. 1899, Vol. 1, Part 1).

This Court has never held that officers of the Government acting outside the boundaries of the United States were without the sphere of the Constitution, but merely that in each instance the applicable provision must be sought for in the relation which the territory, in which the act complained of occurred, bore to the United States.

Dorr *v.* U. S., 195, U. S., 138.

Certain rights are said to belong to all men under the dominion temporary or otherwise of the United States, among them "the right to personal liberty and individual property."

Downes *v.* Bidwell, 182 U. S., 244, 282.

Hawaii *v.* Mankichi, 190 U. S., 197.

If under the Spanish law the slaughter house concession were property, then it was entitled to protection. The real question is what was property in Cuba. The property spoken of in the Treaty was that which existed in the locality, hence the criterion is not American but Spanish law.

The United States has been so observant of this principle that it has not even declared free the slaves in Jolo until compensation is made to the masters.

This is indeed an extreme case, but it indicates the reluctance of our Government to interfere with property even when of a nature expressly forbidden by our Constitution and abhorrent to our moral and political principles.

The United States might have freed its slaves in Jolo long ago by compensating their masters. But the nearest we have so far come to such an emancipation is Article X of the treaty between Brigadier General Bates and the Sultan of Jolo, to wit:

> "Any slave in the archipelago of Jolo shall have the right to purchase freedom *by paying the master the usual market value.*"

It is true that when the President approved and confirmed this agreement, he said that it was "not to be deemed in any way to authorize or give the consent of the United States to the existence of slavery, a thing which is made impossible by the Thirteenth Amendment to the Constitution of the United States."* But the fact remains that slavery continues to exist in Jolo under the flag of the United States because it cannot lawfully be abolished without compensation, on account of the protection given to property of "ALL KINDS" by the VIIIth article of the Treaty of Paris.

Why should the officers of the United States respect the right of property in human beings as slaves in one of our new possessions, and at the same time, without legal process, or hearing, in a

*Mr. Root to General Otis, October 27, 1899, Senate Doc. No. 136, 56th Cong., 1st sess., p. 109.

country which has not been annexed, confiscate the O'Reilly concession?

There is nothing against public morals nor even against good sense in the franchise which the plaintiff held. She had to perform an important and necessary service and there is no pretense that she did not faithfully and efficiently perform it. It was a useful service and there is no reason why, if it was properly performed, she should not continue to enjoy the profits of it.

This is property under every jurisprudence. It was declared to be property by the statute law of Spain, one of the parties to the Treaty, and nothing has been produced to show that the recognition of such property was repugnant to American ideas or was not included in the very ample term "property of all kinds."

Under the treaty of Peace with Great Britain in 1814, Great Britain agreed to restore to the United States, without delay, "slaves or other private property" carried away by her troops during the war of 1812.

A question arose concerning the construction of that article which was settled by the arbitration of the Emperor of Russia, April 28th, 1822, which held that the United States were entitled to indemnity for all slaves carried away by the British forces.

1 Moore's Int. Arbs., 350-358.

It will be noted that this was done with reference to a class of property even then not universally recognized.

The purpose of the United States in occupying Cuba was not radically to change its laws or institutions. The war with Spain was not under-

taken in an access of democratic and anti-monarchic fervor, nor was General Brooke sent to Cuba as the practical exponent of "the rights of man", empowered to put at once into operation all the principles (or fancies) of Rousseau's Social Contract.

The famous Joint Resolution of Congress of April 20, 1898, says that:

> "The United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said islands, except for the pacification thereof."

How the pacification of Cuba required the annihilation of the O'Reilly concession has not been explained.

The Military Governor himself must have understood his mission as pacific, not revolutionary, for in his proclamation of January, 1899, he says:

> "The object of the present Government is to give protection to the people, *security to person and property.* * * *
> The civil and criminal code which prevailed prior to the relinquishment of Spanish sovereignty will remain in force, with such modifications and changes as may from time to time be found necessary in the interests of good government." (War Dept. Report 1899, Vol. 1, Part 6, p. 7).

Thus the plea that the intervention of the United States required property rights to be taken away when not sufficiently "up to date" to suit the political views of the Commander is seen to lack foundation.

We are not here asking the United States to assume a Spanish or Cuban obligation, or in fact

any obligation whatever. As matters stood at the date of the Spanish evacuation, there was no obligation upon either the Spanish Crown or the City of Havana to pay any compensation or indemnity to the plaintiff, and no such obligation could arise so long as she was left undisturbed in her franchise. It was General Brooke's personal act of arbitrary power in destroying her property for which we seek redress against him.

That her franchise was "property" under the law in force in Cuba at the time was conclusively found as a fact by the Trial Court. Even if this finding were open to review here, we submit that it is independently demonstrated by facts and records of which this Court takes judicial notice.

IV.

The plaintiff's franchise was not abolished by any exercise of "police power", nor could there have been any reason of public health or sanitation requiring the exercise of that power.

The evocation of the police power was an afterthought. Mr. Magoon in his elaborate report to the Secretary of War does not mention that as a ground for the abolition of the concession (Magoon's Report, p. 194).

It was only upon the trial, when it clearly appeared that the "office theory" was no longer tenable, that that defense was raised. In view

of the documentary history of this concession and its abolition by General Brooke, the findings of the Court that no question of sanitation entered into the suppression of this property right are evidently unimpeachable. These documents are all the subject of judicial notice and will be referred to.

No proof was produced that the slaughter house was in any respect a public nuisance, nor that its character had anything to do with the destruction of the privilege of the plaintiff to slaughter cattle and to distribute the meats in the City of Havana (War Dept. Rep. 1899, see pp. 18-20, *supra*).

By the very terms of the answer the nuisance was in the use of the Matadero Creek as a drain in accordance with the Spanish custom. This matter was wholly disconnected with the O'Reilly concession and was remedied several months before General Brooke abolished the concession.

On this point we would call attention to:

(*a*) The language of the defendant's order itself. The ground there stated is not that the slaughter house was considered prejudicial to the public health but that the existence of the office with its special privileges was "considered preju-"dicial to the lawful interests and general welfare "of the Municipality," and was "a measure de-"manded by public policy," etc. (Rec., fol. 44).

What this public policy was is completely attested by the report of General Ludlow which states very clearly (War Dep. Rep., 1899, Vol 1, Part 3, pp. 233-234) that the concession was abolished upon the report of his finance commission, as a part of a scheme for reorganizing the

finances of the City, and was on a par with the suppression of the contract for the furnishing of water, the result of which General Ludlow states in figures to have been an advantage of some $10,000 per year to the funds of the Municipality. That the water concession was disposed of in complete analogy with the suppression of the Slaughter House privilege, although the water supply was "clean and wholesome"—see Gen. Ludlow's Report, cited *supra* (War Dept. Report, 1899, Vol. 1, Part 3, p. 285).

See further, Major Dudley's Report, as follows:

> "Some concessions granted by the Spanish "Government appeared to be contrary to pub- "lic policy and the interests of the people, as "giving to the concessionaries rights which "were an incumbrance upon the community "and inconsistent with modern systems of "government. One of these was what is "known as the 'O'Reilly concession,' or he- "reditary right, originally granted in 1704, "to perform certain duties in connection with "the slaughter house of the city of Havana, "and to collect certain sums therefor. This "was abolished by order of August 10, 1899." (Report of Maj. Edgar S. Dudley, Judge Advocate, War Dept. Report 1899, Vol. 1, Part 6, p. 166).

(*b*) That the actual condition of the Slaughter House itself was not a cause for suppression is further indicated by the report of the Chief Engineer to whose Department the sanitation of Matadero Creek (Slaughter House Creek) was entrusted, and which makes no allusion to the Slaughter House itself. (War Dept. Report 1899, Vol. 1, Part 3, p. 272).

Counsel cite the Slaughter House Cases (16 Wall., 36), on the general proposition that a

Government may regulate the killing of animals under the general police power to preserve the health of the community. The proposition we do not attempt to controvert. It is now elementary constitutional law. But there is here no question of police power. General Brooke might have made regulations requiring the work to have been done differently or elsewhere had there been abuses, but he did none of these things, and as we have shown, not only was the work satisfactorily performed, but when the defendant took it away from the plaintiff to give it to the City, the latter retained the same manager, Canosa, who continued to do the work "as heretofore."

On the contrary the concession had originally been granted on grounds wholly compatible with the public health and which even in the United States would have sustained the validity of a monopoly.

> "It is not, and cannot be successfully controverted, that it is both the right and the duty of the Legislative body,—the Supreme power of the State or Municipality— to prescribe and determine the localities where the business of slaughtering for a great city may be conducted. To do this effectively, it is indispensable that all persons who slaughter animals for food shall do it in those places *and nowhere else.*" (16 Wall. at p. 61).

This is precisely what was provided for by the plaintiff's concession.

So far then from the public health requiring the suppression of the monopoly, it required its continuation.

This was tacitly, and perhaps unconsciously, admitted by General Brooke, for instead of popu-

larizing the slaughterhouse rights, he merely transferred them to the City which continued the "Monopoly." Was this experiment in municipal socialism necessary to the pacification of Cuba? We have no reason so to believe.

In the Butchers Union Co. *v.* Crescent City Co., 111 U. S., 746, it was held that the legislature could confer similar rights upon another corporation, because the legislature in the exercise of the police power was not subject to any limitation as to impairing the obligation of a contract.

Even assuming *arguendo* that the American law and not the Spanish was applicable, there is a palpable distinction in that the Louisiana Act did not prevent the original company from carrying on its business, but merely conferred similar rights upon another Company. Had the legislature forfeited the Charter of the first company and turned over all of its business to another, without even a claim that the work was performed in an improper or unsanitary way, then the two cases would have been more nearly alike.

The vital distinction is that no question of public health arose in connection with this concession, while in the case referred to the decision was based upon the proposition that "the best interests of social organization" forbids the legislative power to divest itself of the power to enact laws for the preservation of health" (p. 751).

Assuming that the Crown of Spain could only grant the O'Reilly concession subject to the police power, can it be assumed that it could therefore at any moment merely *transfer* it to some one else? Surely if such had been its power, would it have provided for indemnity in case the concession were extinguished? Certainly not.

Yet the defendant simply took B's franchise and gave it to A.

It is not possible for a public official to destroy property by merely denominating it a nuisance.

> See Dobbins *v.* Los Angeles, 195 U. S., 223.
>
> Also article by Goodnow on Abatement of Nuisances, in Columbia Law Review, April, 1902, where authorities are gathered.

The findings of the District Court that the management of the slaughter house was clean and efficient (Rec., fol. 48), and that the defendant's order "was not justified as a valid exercise of the police power" (fol. 51) cannot be questioned. The public documents show the situation to be exactly as found by the Court below.

IV.

There was no valid ratification of defendant's act.

This question was fully treated in our main brief and as defendant cites no cases not there adduced, it is unnecessary to discuss it further. The defendant seeks to distinguish those cases on the theory that while they might apply to a British governor of an organized colony, they could not apply to one who, like General Brooke, received "his broad power," not from anything in the Constitution, but from "the extraordinary circumstances, the international situation, the un-

organized condition of the sovereign people of Cuba, *the duty and the need to bring democratic government in all its parts into existence*" (Def. Brief, p. 35).

This distinction we fail to find any legal support for, either in legal precedent or legal theory. On the contrary, the "extraordinary circumstances" only emphasized the duty of the defendant to respect vested rights of property.

Conclusion.

The judgment of the Court below should be reversed and the case remanded for an assessment of the damages sustained by the plaintiff by reason of defendant's confiscation of her concession or franchise because:

(1) Such concession was a vested right of property protected by the Constitution, the Treaty and International Law.

(2) Neither the Secretary of War, nor Congress, could by any attempted ratification deprive plaintiff of her right of action against this defendant for the taking of her property.

Respectfully submitted this 24th day of February, 1908.

PAUL FULLER,
FREDERIC R. COUDERT,
CRAMMOND KENNEDY,
HOWARD THAYER KINGSBURY,
of Counsel.

Appendix.

135 Federal Reporter, pp. 384-391.

O'REILLY DE CAMARA *v.* BROOKE.

(District Court, S. D. New York, February 27, 1905.)

1. OFFICERS OF UNITED STATES—CIVIL LIABILITY FOR TORTS—MILITARY GOVERNOR OF CUBA.

The military governor of Cuba, appointed by and representing the United States during its temporary occupation of the island after the conclusion of peace, pursuant to the treaty of Paris, is not exempt from personal liability for a tort committed in his official capacity against an individual in the course of the civil administration of the affairs of the country.

2. SPANISH TREATY OF 1899—MILITARY OCCUPATION OF CUBA—PROPERTY RIGHTS OF RESIDENTS.

As alleged in her complaint, plaintiff, a Spanish subject, and resident of the city of Havana, through purchase by her ancestors was the owner of a hereditary alienable office created by the Spanish crown known as the "Alguacil Mayor of Havana," pertaining to which as a personal or property right was the exclusive franchise or right to conduct the slaughter of cattle in the city of Havana, which franchise had always been recognized by the Spanish government as a valuable property right, of which the owner could not be deprived without compensation. Defendant, while

military governor of Cuba in 1899, during its occupancy by the United States, and in time of peace, by an executive order abolished the office, and transferred the appurtenant franchise to the city of Havana. Such order did not purport on its face to have been made in the interest of the public health or in the exercise of any police power, but so far as appeared, the transfer was purely arbitrary. The treaty of Paris, pursuant to which the American occupation was held, provided that "the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation for the protection of life and property," and, further, that "the relinquishment of Spanish sovereignty shall not be held to impair the property or rights which by law belong to the peaceful possession of property of all kinds of private individuals of whatsoever nationality such individuals may be." Held, on demurrer, that plaintiff's franchise was private property within the protection of the treaty, and of which she could not lawfully be deprived without compensation; that the fact that such franchise was a monopoly, which would be void under the laws of the United States or by the common law, was immaterial, it being valid and protected by the law of Spain.

3. Officers of United States—Liability for private property taken.

If an officer of the United States takes the property of a private person for public use without compensation, he is liable in tort for the trespass, although the government may also be liable on an implied contract.

ON DEMURRER TO COMPLAINT.

COUDERT BROS.,
(Paul Fuller and Frederick R. Coudert, of counsel), for Plaintiff.

CHARLES W. RUSSELL,
Special Asst., Atty. Gen., for Defendant.

HOLT, J.—This is a demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action. The action is brought by the Countess of Buena Vista, a subject of the King of Spain and a resident of the City of Havana, against Major-General John R. Brooke, who was in the year 1899 Military Governor of the Island of Cuba, to recover damages caused to the plaintiff by an order of General Brooke abolishing a right of franchise to slaughter cattle in the City of Havana, owned by the plaintiff. The action is brought in this court under the provisions of subdivision 16 of section 563 of the U. S. Revised Statutes, which confers jurisdiction upon the United States District Courts of all suits brought by an alien for a tort in violation of the law of nations or of a treaty of the United States. The substantial facts alleged in the complaint, are that in 1728 an ancestor of the plaintiff purchased, with the consent and approval of the Spanish crown, a hereditary and alienable office known as the Alguacil Mayor or High Sheriff of the City of Havana, an office to which pertained certain purely official functions, such as the perpetual right of sitting as a member of the Municipal Council of Havana, and a certain personal and property right, consisting of the exclusive

franchise or right to manage and conduct the slaughter of cattle in the City of Havana, and to charge for each head of cattle so slaughtered for use in said city, at certain specified rates; that said office descended by inheritance to the plaintiff; that in 1859 the Spanish government promulgated a law or decree relating to municipalities in the Island of Cuba, which provided, in substance, for the extinction of the political functions of said office and their transfer to a municipal council to be elected, but which also provided that the emoluments or profits of the office should be valued and paid for, and that until such payment the holders of the office should continue in the receipt of its emoluments; that in 1878 the Governor General of Cuba published a decree, having the force of law, providing that the perpetual councillors should cease to perform any duties, and that their offices should no longer be counted among the offices of the municipal council, the members of which thereafter should be elected, but which also provided that the provisions of the Law of 1859, directing that the perpetual councillors should not be deprived of any emoluments to which they were entitled, until the proper indemnification therefor should be paid to them, should remain in force; that proceedings were taken for the condemnation of the property rights appurtenant to said office, but were never completed, and that the property rights remained in force and were exercised by the plaintiff down to the time of the Spanish War; that in performing such service the plaintiff employed some seventy workmen, fifty oxen and more than twenty carts, and incurred great expense in the maintenance of the necessary instrumentalities; that on and prior to May 20,

1899, the whole Island of Cuba was under the military jurisdiction of the United States, in pursuance of the Treaty of Paris of December 10, 1898, providing for the relinquishment of the Island of Cuba by the Spanish government and its temporary occupation by the United States; that the said treaty contained the declaration that "the United States will so long as such occupation shall last assume and discharge the obligations that may under international law result from the fact of its occupation for the protection of life and property," and further that "the relinquishment of Spanish sovereignty shall not be held to impair the property or rights which by law belong to the peaceful possession of property of all kinds of private individuals of whatsoever nationality such individuals may be;" that on said May 20, 1899, Brigadier-General William Ludlow was Governor of Havana, and that on that day the said City of Havana and Island of Cuba being in profound peace, and completely subject to the dominion, authority and administration of the United States under its pledge in said treaty for the protection of property and of all rights which by law belong to the peaceful possession of property by private individuals, General Ludlow, without notice to the plaintiff or affording her any opportunity to be heard, and without any complaint of the manner in which she was exercising her said rights and duties and conducting the slaughter of animals in Havana, issued an order by which he declared that the hereditary grant or privilege in connection with the service of the city slaughter house, of which the O'Reilly family, its grantees or lessees, were the beneficiaries by inheritance or purchase from the original grantee, was thereby terminated

and declared null and void; that the City of Havana, through its authorized agents, should make provision for the execution of such services as should be necessary in connection with the care of the slaughter house, the killing of animals for food, and the delivery of meat to the local dealers in the city, and to that end should, by hire or purchase, procure such wagons, carts and draft animals, and engage such services as might be necessary for the purpose in question, and that the present owners of the abrogated privilege might seek in the courts the establishment and valuation of such equities or legal rights as they might believe themselves to possess; that the plaintiff appealed from this order to the defendant, Major-General Brooke, the Military Governor of Cuba; that the defendant, thereupon, on August 17, 1899, issued an order affirming the order of General Ludlow, abolishing the old alienated office known as Alguacil Mayor of Havana, together with all rights, duties and privileges pertaining thereto, denying the right of the claimants to receive any of the emoluments thereof, and providing that the municipal corporation of Havana might adopt proper measures to provide the necessary means of performing the municipal services theretofore discharged by the claimants to the ownership of said office; that by said orders the plaintiff was deprived of the rights and franchises granted to her by law, and was thereafter prevented from receiving the emoluments thereof; that the said act of the defendant was in violation of the said treaty and contrary to an order of the President of the United States, issued July 13, 1898, which provided as follows:

"Though the powers of the military occupant are absolute and supreme, and immediately oper-

ate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of persons and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent, and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by ordinary tribunals, substantially as they were before the occupation. * * * One of the most important and most practical problems with which it will be necessary to deal is that of the treatment of property. * * * Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause;"

that the act of the defendant in issuing said order was contrary to the constitution and laws of the United States, and in violation of the provisions of the Treaty of Paris, and of the said instructions of the President of the United States; that it was a confiscation of the plaintiff's property, and was wholly unlawful, tortious and unauthorized on the part of the defendant; and that it was also in contravention of the said Spanish laws of 1859, and of said decree of 1878. Judgment is demanded for damages alleged to amount to $250,000.

The questions involved in this case are novel, and I have reached a conclusion with hesitation. The counsel for the defendant claims that the action of General Brooke was a governmental act; that he, as governor general, exercised in trust either the sovereignty of the people of Cuba or sovereignty as representative of the sovereignty of this country; that in him was the entire legislative, executive and judicial power;

and that for any act done by him in that capacity he is exempt from suit under the general principle that any sovereign is exempt from private suit for a governmental act. There are undoubtedly cases in which persons exercising substantially sovereign authority, in subordination to a sovereign power, have been held exempt from liability. Thus it was held that the East India Company was exempt from private suit in respect to the exercise of that portion of its power in India which consisted in the right to acquire, retain and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the native powers of India (Secretary of State in Council of India *v.* Kamachee Boye Sahaba, 13 Moore P. C., 22, and cases there cited). So the Lord Lieutenant of Ireland has been held to be exempt from liability to private suit for acts done in his official capacity (Sullivan *v.* Spencer, Ir. R., 6 C. L., 173). But the general rule, in England, is well established that the governor of an English colony, in time of peace, is liable for any tort committed by him, unauthorized by law (Mostyn *v.* Fabrigas, 1 Cowp., 161). In Philip *v.* Eyre (L. R., 6 Q. B., 1) the Governor of Jamaica was held exempt from liability because the Colonial Legislature had passed an act of indemnity, but it was substantially admitted that but for such act he would have been liable to an action for torts alleged to have been committed in violation of law, although in that case the defendant asserted that the acts were done for the suppression of a mutiny or a threatened mutiny. So it is well established that officers of the United States are personally liable for torts in violation of law, although done in good faith and in supposed obedience to acts

of Congress or the orders of superior officers (Little *v.* Bareme, 2 Cr., 170; Mitchell *v.* Harmony, 13 How., 115; Bates *v.* Clark, 95 U. S., 204). Similarly, public officers of any kind are liable personally in suits in tort to recover damages for illegal acts done in their official capacity. This rule has been applied to tax officers, enforcing taxes under an unconstitutional State law (The Virginia Coupon Cases, 114 U. S., particularly Chaffin *v.* Taylor, 114 U. S., 309; Carter *v.* Greenhow, id., 317). So actions in ejectment and detinue may be brought to recover property held, without legal authority, by officers of the United States, although held in behalf of the United States (Grisar *v.* McDowell, 6 Wall., 363; United States *v.* Lee, 106 U. S., 196). So a suit for the infringement of a patent may be maintained against an officer of the United States, personally, who infringes a patent while doing work in behalf of the United States (Belknap *v.* Schild, 161 U. S., 10).

I think, under these decisions, that the defendant is not exempt from personal liability in this action on the ground that his order was an exercise of sovereign power. His act was not an act done by a military commander in time of war. He is described in the complaint as the Military Governor of the Island of Cuba, but it is also alleged in the complaint that the City of Havana and Island of Cuba were in profound peace and completely subject to the dominion, authority and administration of the United States. The annulment by General Brooke of the plaintiff's right to carry on the slaughtering business, and its transfer to the City of Havana, was not in its nature a military act, but was essentially an act done in the course of civil administration.

The defendant's counsel claims that the plaintiff's right or franchise in the slaughtering business was a kind of private property, the protection of which, after the transfer of Cuba to this country, was not contemplated by the treaty. It was, in my opinion, clearly property. It was a grant from the Crown of Spain, from which a valuable income was derived; and it was just as genuine property as if it had been a grant of land from which rents were derived. It was undoubtedly a kind of property which does not exist in this country. It was a pure monopoly. Every student of English history is familiar with the great controversies about monopolies, between the Crown and the English nation, in the reigns of Elizabeth and James I, resulting in the decisions of the courts that they were void at common law, and the Statute of Monopolies declaring them illegal by Act of Parliament. They have ever since been held in England and this country to be void at common law, and are now prohibited in this country by the fourteenth amendment to the constitution. In the Slaughter House cases (16 Wall., 36) the State of Louisiana had incorporated a company, to which it gave the exclusive right to maintain stockyards and places for slaughtering cattle, in a certain part of the City of New Orleans. The validity of that legislation was attacked, and the minority of the court were of the opinion that it was void as creating a monopoly. The majority of the court, however, held that it was valid as an exercise of the police power, and that it did not create a monopoly, because any butcher who wished to carry on his trade was authorized to do it at the company's establishment. But it was practically admitted, in the opinion of

the majority in that case, that the trade of a butcher is a trade which, by the common law, any man is free to enter upon and to follow; and that an act of the Legislature conferring upon any particular person or company the right to carry on the trade of a butcher in any community to the exclusion of all other butchers would be void. But in many countries monopolies granted by the Crown are a perfectly valid species of property. The complaint in this case alleges, and the demurrer admits, that the plaintiff's right or franchise always was and always has been recognized as private property by the Spanish law; and, therefore, in the interpretation of the treaty, the plaintiff's right or franchise must be held to have been private property.

But it is claimed that, being a kind of property which is not recognized in this country, it could not have been within the contemplation of the parties to the treaty that it should be protected by this government after the relinquishment and the transfer of possession of sovereignty over Cuba to the United States. It is undoubtedly a kind of property which, by the law of this country, could be at any time abolished by the sovereign power. If such a franchise had been created in this country, it would have been void from the beginning as a monopoly. But it is well settled that the regulation of slaughter houses, in thickly settled communities, is a part of the police power (2 Kent's Com., 340; Slaughter House Cases, 16 Wall., 36); and if any part of such a grant, or any grant of a somewhat similar nature, under certain circumstances, might be upheld as a valid exercise of the police power, as occurred in the Slaughter House Cases, it is well settled that such a grant is not, in this country, protected by the constitutional

provision rendering invalid any law impairing the obligation of contracts, and that any State which has granted any privilege, in the nature of a monopoly, under the police power, has a perfect right to terminate such a grant at its option at any time. No State can grant or bargain away its right to exercise the police power (Butchers', &c., Co. *v.* Crescent City, &c., Co., 111 U. S., 746). It is clear, therefore, that, if such a right or franchise as that of the plaintiff had been originally granted in this country, in the exercise of the police power, it would have been in the power of the government to annul the grant, in the exercise of the same power, and that is what the defendant's counsel claims was done in this case.

But, in my opinion, there is nothing alleged in the complaint which justifies the inference that General Brooke, in annulling this grant, was acting under the police power. It is true that his order recites as follows:

"It being considered prejudicial to the lawful interests and general welfare of the municipality of Havana, and as a measure demanded by public policy and in harmony with preceding orders of the military government, in view of the condition of affairs created in this island by the cessation of Spanish sovereignty, the old alienated office known as 'Alguacil Mayor de la Habana,' together with all rights, duties and privileges pertaining thereto, or derived therefrom, are hereby abolished,"

—but this recital is entirely consistent with the view that there was nothing in the manner in which the business was conducted by the plaintiff which called for the interference of the govern-

ment for the protection of the public health or for any of the objects for which the police power can justly be exercised. There was nothing in the order which provided for any change in the method of doing the business. The right of franchise was transferred, as it stood, to the City of Havana. So far as appears in the case, the reasons why it was considered prejudicial to the lawful interests and general welfare of the municipality of Havana, and why its transfer to the City of Havana was thought to be a measure demanded by public policy, may have been the fact that it was considered a valuable franchise, the profits of which it was deemed desirable that the city should receive. The complaint alleges that there was no complaint in respect to the management of the slaughter house, and that there existed no immediate or impending danger, or urgent necessity for the transfer. The demurrer admits these facts, and although, upon a trial, a contrary state of facts may appear, I think, upon the face of this complaint, it must be assumed that this transfer was not made in the interests of the public health, or in the exercise of any police power, but was simply an arbitrary transfer of a valuable property from one person to another, without compensation.

The defendant's counsel also suggests that the defendant is not liable in this action because the transaction gave rise to an action upon contract against the government, either of Cuba or of the United States. It is well settled, in this country, that if the government, in violation of the provision of the constitution, takes private property for a public use, without compensation, a cause of action arises against the government upon an im-

plied contract to pay for it (United States *v.* Great Falls Mfg. Co., 112 U. S., 645; United States *v.* Lynah, 188 U. S., 446). If the only liability in such a case were one upon contract, obviously this court would have no jurisdiction of this case, for this court has no jurisdiction at common law of an ordinary claim on contract against an individual, under any circumstances, or against the United States, except under the Tucker Act, when the claim is less than $1,000. But, if an officer of the United States takes the property of a private person for public use, without compensation, I think he is liable in tort for the trespass, even if the government is also liable on contract (Hill *v.* United States, 149 U. S., 593; United States *v.* Great Falls Mfg. Co., 112 U. S., 645; Langford *v.* United States, 101 U. S., 341).

But, in my opinion, all the reasoning in this case based on the law and authorities governing the rights and obligations of parties to transactions taking place in the United States is more or less fallacious. The plaintiff's rights in this case are governed by the treaty with Spain, which, like all treaties, constitutes a part of the supreme law. That treaty provided that:

"The United States will, so long as its occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation for the protection of life and property."

International law, as stated in the case of Strother *v.* Lucas (12 Pet., 410), provides that, in the case of the military conquest of a country,

"The conqueror does no more than displace the sovereign, and assume dominion over the country.

A cession of territory is never understood to be a cession of the property of the inhabitants. The king cedes only that which belongs to him; lands he had previously granted were not his to cede. * * * No construction of a treaty which would impair that security to private property, which the laws and usages of nations would, without express stipulation, have conferred, would seem to be admissible further than its positive words require."

So in More *v.* Steinbach (127 U. S., 70), it is said:

"By the cession of California to the United States the rights of the inhabitants to their property were not affected. They remained as before. Political jurisdiction and sovereignty over the territory and public property alone passed to the United States."

The provision in the treaty, therefore, that "the relinquishment of Spanish sovereignty shall not be held to impair the property or rights which by law belong to the peaceful possession of property of all kinds of private individuals of whatsoever nationality such individuals may be," applies to the property and rights of Spanish subjects in Cuba under Spanish law at the time. The relinquishment of sovereignty over the island must be deemed to have been in consideration of the provisions of the treaty by which the United States guaranteed the protection of the private rights of property as they existed in Cuba. The question is not whether the plaintiff's right or franchise was property, under the laws of the United States, which under those laws could be interfered with or abolished, under the police power or any other power. The question is, was it property under

the law of Spain? The complaint alleges that it was, and the Spanish acts and decrees set forth in the complaint show that the government fully admitted that, until the plaintiff was compensated for the value of her franchise, her right and property in it was valid and indefeasible. The Spanish Civil Code, as set forth in the complaint, provides as follows:

"Article 349. No one shall be deprived of his property, unless it be by competent authority, and with justified cause for public utility and never until he has previously been properly indemnified.

If this requirement has not been complied with, the judges shall protect, and in proper cases replace the condemned party in possession."

"Article 336. As personal property are also considered rents or pensions, either for life or hereditary, in favor of a person or family; also purchased public offices, contracts for public services," &c.

I think it clear from these provisions that under the Spanish law, before the plaintiff could be deprived of her rights in this franchise, its value must have been determined and paid to her.

My conclusion is that the demurrer should be overruled, with leave to the defendant to answer within twenty days, upon payment of costs.

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

DONA MARIA FRANCISCA O'REILLY DE CAMARA, plaintiff in error,
v.
JOHN R. BROOKE, MAJOR-GENERAL, U. S. Army.
No. 104.

BRIEF FOR DEFENDANT IN ERROR.

I.

It appears by the complaint filed in this case and other pleadings that the District Court had jurisdiction of the persons and subject-matter; a jurisdiction asserted and invoked and not now questioned by the plaintiff in error, who was also plaintiff below.

That being so and judgment of dismissal having been rendered by that court after a trial by consent without a jury, the case was terminated in the District Court. There is no right to a review by this court upon writ of error.

This court has not the facts of the case before it and does not know whether the court properly applied the law to the facts—the facts including foreign laws.

The judgment of the court and the only judgment was that "the complaint herein be, and the same hereby is, dismissed."

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The reasons for the judgment are not part of it, nor can a judgment be overturned by a higher court on account of any difference of opinion concerning the reasons given by the lower court for entering it, but only because no such judgment ought to have been entered.

The facts of the case have not been found by a jury's general or special verdict; and this court will not consider alleged facts purporting to be found by a district judge, since the law recognizes no such tribunal for ascertaining facts.

Accordingly this judgment must not be disturbed. Prior to the act of March 3, 1865, providing for a trial without jury in the Circuit Court (see R. S., 649, 700), a case went up from the Circuit Court for California, involving part of the "Rancho san Leando," the parties waived a jury, and the court "proceeded to find a long history of facts, which is set forth in the record," and "the second bill of exceptions contained the elaborate opinion of the court, in which questions of fact and questions of law were all decided." Chief Justice Taney delivered the opinion of the Supreme Court. (*Campbell et al.* v. *Boyreau*, 21 How., 225.)

He said, among other things: "As this court can not regard the facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal. Consequently, as the Circuit

Court had jurisdiction of the subject-matter and the parties, and there is no question of law or fact open to our reexamination, its judgment must be presumed to be right, and on that ground only affirmed."

In another case reported in the same volume (*Kelsey et al.* v. *Forsyth*, p. 85) the parties had expressly stipulated, in waiving a jury, for "the right of either party to avail himself, in the Supreme Court, of any erroneous ruling of this court, precisely as though the cause had been submitted to a jury, with the liberty to either party, if it should be necessary to the hearing of this cause in the Supreme Court, to treat the evidence involved in this cause in the nature of a special verdict. The parties then proceeded to offer their evidence, consisting of deeds, records," etc.

The Chief Justice delivered the opinion of the court affirming the judgment below upon the same principles.

In 1891, in the case of *Rogers* v. *United States*, 141 U. S., 555 (a case tried in a District Court, to which Revised Statutes 649 and 700 do not apply), the court, quoting at length Chief Justice Taney's opinion in *Campbell* v. *Boyreau*, affirmed the judgment upon the same grounds, and cited numerous cases in which the principles of that decision had been applied.

II.

The court below explains how the slaughterhouse business should have been carried on in modern times (R. foot of p. 15 and top p. 16). The entire products should have been saved and utilized, etc. The court states that this business was so conducted that

the filth infected the air to such an extent that the deaths in a neighboring hospital were 60 per cent of admissions. Such air must have tainted the meat in the slaughterhouse. But it is contended that because this filth was dumped into a creek which received also sewage from houses on its banks, and because it was the duty of the public authorities to keep the creek clean as a part of their general duty to provide for the removal of filth and for adequate sewage for the city, the plaintiff had not created the nuisance, and had a right to go on as before. Suppose she had dumped this filth on the streets, which the public authorities had the duty of keeping clean, what then?

If this case were before the court on the merits, we should contend that there is not and never was any just and legal basis for this claim against General Brooke under Revised Statutes 563, giving jurisdiction to the District Courts "of all suits brought by any alien for a tort 'only' in violation of the law of nations, or of a treaty of the United States." The treaty provisions relied upon, articles 1 and 8 of the treaty with Spain (quoted in the complaint on record, printed page 6) were not intended to protect the alleged rights or property of the plaintiff. A thing may be within the letter of a treaty and without the intent. If this so-called property was within the broad words of article 8, let us see whether the circumstances and the nature of the "property" should lead to the conclusion that the makers of the treaty did intend to oblige us to protect that "property."

First, then, as to the nature of the property or rights, what do we find, taking all that the court below sets forth about the Spanish law, including its statements that there were property rights appurtenant to the office of the alguacil mayor (high constable) of Habana (R., p. 25), that originally to the office "there was also attached in addition to its purely official functions, a personal and property right, being the franchise or right to manage and conduct the slaughter of cattle in the city of Habana." Our first proposition is that, whether a public office is an alienable office or periodically elective or appointive, it is everywhere and in all cases a part of the sovereign authority or a vehicle for such authority and can not survive when the sovereignty departs or is extinguished, and that the termination of Spain's sovereignty as a result of war put an end to this office long before General Ludlow or General Brooke issued any order about it.

That termination took place prior to or at the ratification of the treaty of peace.

Such being the case and the extinction of Spanish sovereignty with all that belonged to it being clearly contemplated and provided for as a great *fundamental fact*, the treaty did not intend, whatever its words may be, to preserve the existence of public offices or any appurtenances of offices. To do this under such circumstances would have required express language indicating such a purpose and something more than the usual provision for the protection of *property*. That usual provision contemplates

future protection to property that will continue to exist—not to property whose extinction is involved in the very fact of extinguishing sovereignty.

The treaty should be read as though it said, first and foremost, all Spanish sovereignty, with all the offices, functions, instrumentalities thereof, is at an end from the date of this treaty. This being first understood, property (haciendas) that will remain is to be protected.

Still less did the treaty intend to saddle the new sovereign with the indebtedness of the old, whether arising by way of compensation for former offices or of any other kind. This our commissioners repeatedly refused to agree to. They repeatedly refused to recognize not only the so-called "Cuban debt," but, generically, "all charges and obligations" and "contracts for public service," saying that Spain's propositions appear to be "not a proposition to 'relinquish all claim of sovereignty over and title to Cuba,' but in effect a proposition to 'transfer' to the United States and in turn to Cuba a mass of charges and obligations which in the opinion of the American Commissioners properly belong to Spain." (Senate Document 62, Pt. I, 55th Cong. 3rd sess., pp. 27, 33, 45, 52, 58, 59, 241, and *passim* throughout the report of the negotiations.)

Upon the face of the laws and decrees found by the judge as facts and notwithstanding his interpretation of them, we say that "the emoluments" of the office, if the office had been pared down to "the emoluments," did not cease to be "emoluments" of an

"office," emoluments to be collected by virtue of the sovereign authority of which the whole office was a part or a vehicle. No part of the office and no fee or tax collected by virtue of holding it or having held it could survive the sovereignty which had created and maintained the office and lent the sovereign power to support the tax or fee.

If the office was abolished and the "emoluments" collectable from individuals until Spain's treasury should pay the compensation due, these emoluments were either so much to be deducted from the treasury's debt or they were the tax originally allowed by the King's prerogative to be collected by his favorite as a perquisite of the office.

III.

This was one of the many alienable crown offices in Cuba, and it seems to be found that these offices survived the Spanish law of 1859. (Rec., p. 23.) In 1878 it is supposed—but is this correct?—that a decree of 1878, abolishing some of them, included that of alguacil mayor.

The court recites "until the actual abolition of this office in 1878," and says that then "the franchise and property right became separated from the said office." But has not this court a right to put its own construction upon a Spanish decree completely set forth in the findings? If it has, then it appears that the decree of 1878 has been misinterpreted and "the franchise and property right" continued to be appurtenant to the office, so far as that decree is concerned.

That decree concerns only town councilmen (regidores) of Habana and affected the high constable, if at all, only in his capacity of councilman. He was *both* a town councilman and high constable (R., p. 19), and the decree of 1878 distinctly provides that the perpetual councilmen "shall cease in the performance of the duties pertaining to them," and that thereafter all councilmen shall be elected.

Clearly that says nothing about the duties of high constable. Nor is it improbable that the favorites of the O'Reilly family were intentionally omitted, if thought of at all.

If there had been no separation from the office of its appurtenant or attached franchise or property right when Spanish sovereignty ceased, and if, moreover, there were then (as there were) divers other alienable crown offices, e. g., the official procurators or attorneys, is it to be supposed that our treaty makers intended to embrace all such offices and their appurtenances or the appurtenances without the things to which they were appurtenant in a provision about property?

The decree of 1878 does not disturb the office of alguacil mayor, but the other office (R., p. 19) of regidor (town councilman). Accordingly, the office of alguacil mayor survived that decree and existed at the moment Spanish sovereignty ceased.

If so, did our treaty makers intend to preserve that perpetual crown office as private property or was it, with all its appurtenances, rights, and privileges, intended to share the fate of that sovereignty of which

it was a part or vehicle and the fate of monarchical public offices in general?

It was property, why?

It was property, it seems, because "under Spanish law, purchasable public offices are considered personal property." (R., p. 25.) "Purchasable," not purchased.

They could hardly be considered real property. But conceding that, for convenience of legal division, "pensions, either for life or hereditary, in favor of a person or family, also purchased public offices, contracts for public services," etc. (R., p. 5), are "considered personal property" and not real, was it really the intention of our negotiators to promise to ignore the fact that, even if so considered, they were nevertheless public offices, that is, parts or arms or vehicles of the sovereignty itself? The first and loudest thing the treaty of peace says is that Spanish sovereignty is to cease.

Why not also preserve "pensions, either for life or hereditary," and all the rest?

Of course, a purchasable public office was "considered personal property." This probably means that the interest in the holding or appointment to the public office the individual acquired by purchase was so to be deemed, not the office itself. And what interest was that? The right to be the incumbent of it and enjoy its emoluments, honors, and privileges while it should continue to exist. Was a captaincy in the British army, when commissions were sold, anything but a public office and trust? Was it a

private affair? Would it have survived British sovereignty on the ground of its being private property? Was the right to be the incumbents of Spanish Crown offices intended to be preserved in Republican Cuba or did all offices share the usual fate of offices upon a transfer of sovereignty and become dependent absolutely for their existence and the right to hold them upon the will of the new sovereign?

We submit that our negotiators had no intention of promising to preserve the right of counts and countesses to be the incumbents of public crown offices and continue to enjoy their privileges or to promise that any such offices or their incidents and appurtenances should continue to exist in the Cuban Republic. If they did, then we have numerous other claimants to deal with, such as the holders of the office of official attorney or procurator. See the opinion of the Court of Claims, filed October 28, 1907, in the case brought by one of these, Alvarez y Sanchez. (Appendix A.)

But if a decree did abolish the office of alguacil mayor, and thereafter the Spanish law about purchaseable offices ceased to apply, why and how is this thing in question property or a property right under the law about alienable offices? We do not see. It is said this thing in question is property because the Spanish code declares purchasable offices personal property, and then it is said, and found by the court, that the office had ceased to exist. What article of the Spanish code declares what survived the office to be property? Is there such a thing as an office without

duties or functions? The decree of 1878 says the former officers shall cease their duties, but not be deprived of any "emoluments to which they are entitled until the proper indemnification be paid." It does not call these "emoluments" a franchise, neither does it omit to call them what they had been before—"emoluments" of the offices. If these "emoluments" were a surviving fragment of the office, they perished with the Spanish sovereignty of which they were part; if they were not, what article of the code declares them property? Franchise is an American word. What Spanish article calls such "emoluments" franchises?

It is true, in the case of the slaughterhouse, as in the case of the new *elective* councilmen, there seem to be some duties to be done for which the emoluments may be considered an equivalent; whereas we have the former perpetual councilmen to deal with on the basis of pay without work, if the decree of 1878 meant to make the "emoluments" personal property, like "pensions" and "contracts for public service."

But not only do we find no Spanish law cited to the effect that "emoluments" preserved by such an act as that of 1878 are property. Even if they are, can it be seriously believed that our negotiators were intending to promise to take care of these echoes of long since abolished Crown offices until Spain, which abolished them for its own public purposes, should or shall pay the indemnity?

To American ears it sounds well to use the word "franchise;" but this is not a question of American law, and we submit that, even if this be a "franchise,"

it is, or was, a franchise given and treated by the Spanish law as *also* an "emolument" of the office, as much so as if it had been a cash fee.

Now, was it intended that Spain could abolish a Crown office in 1878 and charge itself an indemnity indebtedness for so doing, and while in default for a quarter of a century leave an *emolument* of the office to be collected from *individuals* until it should see fit to pay the indemnity, and upon ceasing to be sovereign oblige us and Cuba to continue that state of affairs indefinitely, awaiting Spain's payment of the indemnity?

Is a thing like this within the real intent of a provision, based upon familiar precedents, that when democratic successors of monarchical Spain took over the sovereignty "the relinquishment of Spanish sovereignty shall not be held to impair the property or rights which by law belong to the peaceful possession of property of all kinds of private individuals of whatever nationality such individuals may be?"

We submit that a treaty provision concerning Spanish crown offices or their emoluments was necessary to carry any such extraordinary intent into a treaty by the United States on behalf of itself and Cuba; and that no such stipulation would have been tolerated for a moment. For what did the Cubans fight from 1868 until 1878 when promises of reform were made, of the performance of which this decree of 1878 was a fair sample? For what did the United States fight Spain?

Certainly not to perpetuate, but to destroy, the abuses of the old monarchical rêgime and the special tax-farming privileges of old court favorites and their descendants in connection with defunct peninsular *Crown* offices imposed upon the islanders in Cuba.

And, after all, is this thing in question other than a part of the royal Spanish prerogative power to govern?

The paternal kingly Government of Spain took charge of the Habana slaughter business as a matter of public concern; the building was a public one, belonging to the city of Habana; at least, the court below says counsel admitted this, but counsel has no recollection of the admission and is ignorant about the fact; and incidentally the royal treasury received revenue for turning over to a favorite "the prerogatives and privileges pertaining to the office," among others those of performing the public duty of supervising and managing the public slaughtering and taxing the butchers so much a head for animals slaughtered in Habana. He was to get so many *reals* per head even if the slaughtering should be done by private contract, for he would still have the *supervision*, as expressed in the second condition (No. 4, R., p. 19), unless "otherwise employed," when he could appoint a *deputy* to *supervise*.

As the representative of the King he was to oversee the butchering in Habana and collect a tax or fee from the butchers for so doing. Unless the city should change its system of beef supplying so as to

have this done by contract with individuals, he was not only to supervise, but provide carts and mules for the proper conveyance of the meat. Slaughtering outside of the public abattoir was prohibited, except in case of exigency, and then he was to intervene and attend to the carrying. This was evidently a scheme to prevent him from losing his money for supervising by deputy. Obviously, all this was purely public business, and public business affecting the health of the city. This fact alone suffices to make the whole affair one to be continued or changed, according to the will of the sovereign at any time responsible for the health of the city. That will General Brooke put into effect. The presumption is that, having the governing power of the United States in his hands, he was not acting for private gain or wantonly under pretense of a deliberate governmental act; and in the absence of proof that he was acting from bad, or private, motives no inquiry into his public reasons is permissible any more than as to any other legislature's motives. As this regulation of a public business so obviously important to the public health was within his power as the government or legislature of the island, it is immaterial what his honest public motives for exercising the power were. It is apparent from his previous general law of June 9 about slaughtering in Cuba that General Brooke fully understood the relations of that slaughtering to the public health. The public can not validly abdicate its right to control whatever concerns the public health—that

is, its police power—and any attempt of a preceding sovereignty to do so may be disregarded by its successor.

IV.

Article 8 of the treaty has been misunderstood. Article 1 provides for the performance by the United States of whatever duties result from its occupation of Cuba under international law concerning the protection of life and property (*haciendas*). Article 9 provides that Spanish subjects may remain in or leave Cuba or the other islands, preserving in either event all their rights of property. Article 8 did not superfluously repeat all this, but concerns only the question of buildings and other property belonging to the Crown of Spain. This Crown property Spain relinquishes or cedes, and this relinquishment or cession by the Crown (*esta renuncia o cesion*) is not to impair the rights of provinces, municipalities, public or private establishments, etc. In other words, Article 8 does not go beyond declaring that the rights of the Crown are not to be interpreted as including or carrying with them rights of provinces or municipalities or any other rights not strictly belonging to the Crown. This was a very important provision, as it might well have been doubtful from our American standpoint, how to distinguish between Crown rights or property and other rights and property, as we do not make the same distinctions and have a totally different governmental system. The meaning of art. 1 is that police protection to lives and visible property

(*haciendas*) should be afforded by the occupying sovereign.

The treaty accordingly has no peculiarly strong provisions for the protection of property. Article 1 is vague enough. The international duties concerning life and property resulting from occupation are to be performed—that is, Cuba is not to be outside of the family of nations, with no sovereign responsible to alien governments for the lives and property of their subjects in Cuba; but our Government is to do what the law of nations requires a sovereign to do for their protection *when a sovereign occupies a country under such circumstances*. Certainly this indefinite stipulation does not guarantee a continuance of old offices, unless the law of nations says that a conquering sovereign, beginning an occupation of a province during war and receiving an unconditional and permanent relinquishment of sovereignty over and property in the province, must preserve all old offices in the hands of their incumbents.

It seems to us that law speaks in no uncertain terms about offices, official fees, taxes, pensions, and all else constituting an exercise of the sovereign's will or an instrumentality for the enforcement of that will, and declares that those things and all their incidents and appurtenances cease, or change, or remain as the new sovereign finds them useless or useful for his own purposes and accordant with or discordant from the system of government he sees fit to establish.

A thing may be property—that is, may be owned—but it may be also a public office or something incident or appurtenant thereto.

Now, if this latter thing was within the scope of the words "Spain relinquishes all claim of sovereignty over and title to Cuba," in view of the nature of the treaty, then *this* property at the moment of ratification lost all legal existence, and so was not within the provisions concerning the *future protection* of property or ownership which would continue in existence to be protected.

All foreign affairs, except commerce and the ratification of treaties, are committed to the President. He is the United States with regard to them. He can receive and appoint ministers without authority from Congress, recognize a foreign government, and, in short, do all foreign business, with the exceptions above noted. The governing of Cuba was foreign business, not within the two exceptions, but left to his discretionary power; and while the army he was using as an instrument was subject to the army regulations made by Congress, the governing was all within his province, as foreign business. This is especially true, so far as our courts are concerned; and it is doubtful whether our Constitution or laws should be regarded as reaching to any case growing out of the interior government of a foreign country. The Constitution places no limit upon what he can do in and about such government of a foreign country, but leaves all such foreign matters to his discretion.

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General Brooke held in his hands the sovereignty of the freed Cubans and was a government—legislative, executive, and judicial powers in one—not restrained in its operation by any Cuban constitution, for none had emerged from chaos, nor by the Constitution and laws of the United States, for they have no effect for a foreign country; nor by the treaty with Spain, for that merely agrees that the law of nations shall be respected; nor by the law of nations so far as this matter is in question, for that concerns international affairs, and not the internal government of a country. He had as absolute power as can well be imagined, and it was practically impossible that he could commit a tort in violation of the law of nations by any governmental act honestly and deliberately performed. A tort is a wrong and implies an authoritative prohibition from some source against doing the thing. Does the law of nations say that the sovereignty over Cuba must not change the manner of slaughtering cattle in Habana? Even the old royal order of Spain admitted that the city could at any time do this, although providing that the court favorite, even with nothing to do but supervise or look on, should receive from the butchers the tax of 3 *reals* a head, not as a compensation for anything done for the butchers or to the city, but because he had paid the King for the King's right to collect that tax. Does the law of nations say that when a democratic country assists the inhabitants in conquering a province from a monarchy and forces the monarchy to withdraw, the impositions and abuses which led to the

war for independence can not be destroyed as such, but that the laws and orders that created and contrived them are to be regarded as ordinary laws of property, and these abuses, under the name of property, treated as legitimate and sacred? Does the law of nations require democratic Cuba to continue this royal prerogative system and leave its taxing power in private hands; or does that law permit Cuba, without any tort committed, to substitute a democratic system of government in which the people of Habana, and not the court favorites of Spain, shall conduct the public business of that city?

V.

In passing upon the demurrer the court below said:

> But it is well settled that the regulation of slaughterhouses, in thickly settled communities, is a part of the police power (2 Kent's Com., 340; *Slaughterhouse cases*, 16 Wall., 36); and if any part of such a grant, or any grant of a somewhat similar nature, under certain circumstances, might be upheld as a valid exercise of the police power, as occurred in the Slaughterhouse cases, it is well settled that such a grant is not, in this country, protected by the constitutional provision rendering invalid any law impairing the obligation of contracts, and that any State which has granted any privilege in the nature of a monopoly, under the police power, has a perfect right to terminate such a grant at its option at any time. No State can grant or bargain away its right to exercise the police

power. (*Butchers', &c., Co.* v. *Crescent City, &c., Co.*, 111 U. S., 746.) It is clear, therefore, that if such a right or franchise as that of the plaintiff had been originally granted in this country, in the exercise of the police power, it would have been in the power of the Government to annul the grant, in the exercise of the same power, and that is what the defendant's counsel claims was done in this case.

But, in my opinion, there is nothing alleged in the complaint which justifies the inference that General Brooke, in annulling the grant, was acting under the police power.

Supervision of slaughterhouses and prescribing regulations for their conduct and the disposition of their refuse is a police power inherent in all governments. "It is not, and can not be successfully controverted, that it is both the right and duty of the legislative body—the supreme power of the State or municipality—to prescribe and determine the localities where the business of slaughtering for a great city may be conducted. * * * This power is and must be from its very nature incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. * * * The regulation of the place and *manner* of conducting the slaughtering of animals, and the business of butchering within a city, and the inspection of the animals to be killed for meat, and of the meat afterwards, are among the most necessary and frequent exercises of this power."

(Slaughterhouse Cases, 16 Wall., pp. 61, 62, and 63, and see *L'Hote* v. *New Orleans*, 177 U. S., 598; *Stone* v. *Mississippi*, 101 U. S., 816; *Mugler* v. *Kansas*, 123 U. S., 669; *Fertilizing Co.* v. *Hyde Park*, 97 U. S., 668; *Dobbins* v. *Los Angeles*, 195 U. S., 238.)

The rule stated in *Dobbins* v. *Los Angeles* (195 U. S., 235) relative to municipal action applies to the action of General Brooke in this case.

> Every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community.

Surely, if sanitary matters give rise to such powers in the legislature of a country like America, they should give even greater powers in a tropical place like Cuba. And surely, if notwithstanding the provisions of the English and American constitutions such power exists, General Brooke, organizing a government in the midst of chaos in a country without any constitutional institutions, should, as the supreme legislature of that country, have as great, if not greater, powers. And if the courts should hesitate to place themselves above the legislature here in determining what police regulations should be made, certainly they should hesitate still more to meddle with one engaged in the fundamental organization of institutions in a country without a constitution.

It is notorious that our cities and coasts were always under the menace of infection from Cuba, and of all places in Cuba from the harbor of Habana. In the diplomatic relations and correspondence preceding the war our Minister to Spain was constantly pointing this out, and indeed the fact is too well known in its relation to our intervention to require further comment or authority. In this connection it is worth while to remind the court that in *Gardner* v. *Michigan*, 199 U. S., 325, they held that courts may take judicial notice of the effect of garbage on the public health, just as in *Manigault* v. *Springs* (Id., 473) they held that courts may take judicial notice that the public health is greatly affected by the existence of swamp lands, and the reclamation of such lands is a proper exercise of the police power.

Changing the management of the slaughter house and carting business from private to public hands is a very important regulation. The complainant seeks to make out, because Brooke does not emphasize health conditions, and also because the city authorities did not at once use their power to make a change in the *carrying part* of the business, therefore Brooke was not exercising this police power, but arbitrarily taking away private property.

Suppose this court renders a decision and gives erroneous reasons, does that vitiate its decision? Its decision or decree in a matter within its jurisdiction is good or bad, regardless of its reasons. A higher court would not annul it, but state better reasons. So here,

any regulation of this slaughtering business was an exercise of the police power.

Some evidence indicated that acting under Ludlow's order, which gave them the management, the *ayuntamiento,* after a lengthy and ingenious argument by Canosa, the contractor, did decide to continue him *provisionally* in the meat-carrying part of the business. But Brooke was governor of the island and merely undertook to give the city the authority to properly manage the business. Supposing his motive to be to secure sanitary reformation, it was not his place to do more than remove an obstacle. He would not undertake to regulate the details. Neither did he know in advance that the contractor and his special vehicles would temporarily be retained by the city, although it is not easy to see how the city could have wisely made an immediate change. Such things require time and money and preparation. But as a matter of law, any order in the nature of a law about the management of the slaughtering business is *ipso facto* an exercise of the police power. The slaughtering business and meat-carrying business, especially in the tropics, inevitably concern the public health, and their management, therefore, essentially involves the police power.

It seems wholly unnecessary, therefore, to show that sanitary considerations affected the mind of General Brooke. No private or interested motive is alleged or shown, and his order professes to be based on the public welfare. Not only that: There is abundant evidence that the slaughterhouse man-

agement was such that the vicinity was the most unhealthy point in Habana—the death rate in the hospital there being 60 per cent of those admitted. All this was known to General Brooke and called to his attention by reports of Ludlow and Major Black and others, but doubtless known to him before by sight, smell, and personal observation. Now, this court thought that the police power referred to is part of American institutions and had no existence in Cuba, and could not be exercised in Cuba during our occupation, and especially in view of article 8 of the treaty with Spain, which is supposed to guarantee or insure private property, which property would naturally be ascertained by Spanish law.

As already remarked article 1 of the treaty is a very vague provision. It was made so for a reason. It was fundamentally a part of the treaty that Spain left Cuba to be disposed of by us. We were not willing to promise Spain to annex Cuba, as she would have preferred, in order to better protect the lives of her subjects remaining there from Cuban revenge.

We were not willing to promise her anything concerning the government or disposition of Cuba. We were not sure what disposition would be made of Cuba. Now, this article was intended to take the place of the usual provision made in cases of cession, which provides for the protection of private property, and to say, first, that we were not willing to make any promise of that usual kind, and, secondly, that we recognized that whatever should be done with Cuba while under our

control, the existing circumstances might give rise to some obligations on our part concerning the protection of life and property. Moreover, it was obvious that the law of nations would forbid us to leave the island in anarchy and without orderly government—that is to say, our duties to other nations, including Spain, and perhaps Cuba, would forbid that. Now, as we were undoubtedly free from any promise to Spain not to annex Cuba or to give it any particular institutions or not to give it any particular institutions of government, we could have annexed Cuba and brought it under our police power or rules or could have formally introduced our police power or rules into Cuba. Nothing in the law of nations would forbid either, and if we had done either and subjected property in Cuba to our police power, we should not have done anything contrary to our duty under the law of nations, which the treaty makes the measure of our duty to Spain. Now, then, having, instead of formally declaring our police power as a whole in force, proceeded in this particular case to exercise some of that power, this violates no duty of ours under the law of nations. He who can do a thing can do all parts of it or any part of it. It is not our duty under the law of nations to subject under the police power property of our own citizens to destruction or removal without compensation and to omit to treat in the same way property of other people situated side by side with it.

VI.

Complainant seeks to show that what she is pleased to call a franchise was private property and was no part of the office of high constable or of the functions of that office; that it was a private thing attached or given to the public office; that the office was destroyed by law, but this private thing was not. The answer to that is twofold; first, that critically examining the law and history of the matter we find absolutely no attempt in the law or in executing the law abolishing the office to separate the two things. But if theoretically there was the office and this something else attached to it, this something else was not a private thing. Spanish government, especially in old times, was a paternal government. Many things under it were done by the Government which with us are ordinarily left to individuals. The slaughterhouse business was public business intrusted to a public officer, who was charged with the sanitary inspection of ships arriving, with serving of judicial writs, and many other public matters. Even with us, the line between public business and private business is not so clear that we should regard, in the tropical countries, the carrying on of a great slaughterhouse for supplying the wants of a large city as being of course a private affair. Now, then, this paternal government intrusted to the high constable the public duty, as it was undoubtedly considered, of carrying on this slaughterhouse business for the city of Habana, in a tropical climate, and it is for this reason

that we find no allusion to anything private being connected with the office of high constable.

The dues collected were called "*derecho;*" that is to say, a tax or duty. The receipts are spoken of even by the complainant as "emoluments." So that the functions were either merely functions of the alguacil mayor as such or functions added to those which were as public as the others.

They ceased to exist upon the withdrawal of Spanish sovereignty. All public functions ceased. We often see them continued by the new sovereign, but this is exclusively the result of his will and the officers act only by his free permission.

He can continue offices for his own convenience, or let them continue until he is ready to abolish them, and abolish them when he sees fit, because they are merely fragments of a departed sovereignty, by whose authority they existed and without whose authority they have no existence.

The court quotes an authority to show that the law of nations requires a nation receiving a cession to respect or protect the private property of the inhabitants. This is the custom of nations, but whether it is a rule of the law between nations may be doubted, since it seems to be a matter between a sovereign and his newly acquired inhabitants. Ordinarily a treaty stipulates for such protection, and, especially in the case of extraordinary property, such as slaves, it usually leaves no doubt as to the property to be protected and the extent of the protection. Our Spanish treaty

omits any special provisions in order to give us a free hand in introducing democratic institutions in former monarchical provinces.

But the rule of the "law of nations" quoted is not the only one. It is also a rule of the law of nations, or of the *same kind of law* that acquired territory is held by the new sovereignty subject to its own institutions, not according to the former ones. (*Pollard's Lessee* v. *Hagan*, 3 How., 225.) These two laws are not in conflict, since every civilized nation does respect and protect private property, to the extent deemed consistent with the institutions of the country, which, of course, embody its notions of the public welfare. That is all the protection the law of nations requires, and all that any reasonable nation would expect.

The law of nations does not require a nation to protect property the existence of which is inconsistent with its institutions. It does not require us to protect titles of nobility, slave property, monopolies, clerical salaries, or titles to public trusts or functions.

In Cuba we were to establish new institutions with a free hand, and, so long as they were civilized institutions, the law of nations would not place any restrictions upon them in favor of any nation or the subject of any. We think our institutions, which abhor monopolies, quite as civilized as those to which this "*derecho de punalada*," or slaughter tax, belonged.

Now, General Brooke understood this, and his order shows on its face that what he was doing was organizing the institutions of the island and its municipali-

ties—making them democratic and up-to-date. This was his duty, what he was there for, and not in violation of the law of nations.

VII.

Much stress is laid by appellant upon the cases of *Belknap* v. *Schild* and *Little* v. *Barreme* as showing that the English cases to which we cited the court below contain a doctrine at variance with the American doctrine concerning ratification of an officer's acts.

The patent law, section 22, provides that every patent shall "contain a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the said invention or discovery." As remarked by this court in railroad grant cases, this is a "law as well as a grant," and makes it a violation of law for anyone, even an officer or agent or bureau of officers (e. g., Bureau of Yards and Docks) of the United States engaged in making a caisson or a dam, or the like, to interfere with the exclusiveness of the patentee's enjoyment. As the gate, in the case of *Belknap* v. *Schild*, the accounting and injunction case, was the gate of the United States, and not the private gate of the officers sued, it was held that the United States were a necessary party, and the bill was dismissed "without prejudice to an action at law against the defendants, or to a suit at law against the defendants, or to a suit against the United States," that is, in

the Court of Claims. The case of *Little* v. *Barreme* holds that where Congress passed a law authorizing seizures of vessels going *to* French ports, and where "the legislature seems to have prescribed that the manner in which this law was to be executed was *to exclude* a seizure of vessels not bound *to* a French port," the President is not at liberty to violate this law or to authorize a naval officer to do so. He and the naval officer are supposed to know and obey the law concerning "commerce" with France, which was addressed to both. This is far from saying that *the United States* could not give instructions to seize vessels both going to and coming from French ports, or even that the *President* could not, in the absence of positive law to the contrary, "without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States to seize and send into port for adjudication American vessels which were forfeited by being engaged in this illicit commerce." The court says he probably could. We do not contend that the President is above any law Congress is given express power to enact, or can authorize an officer to disobey it. The present case presents no such question. What we say is that the Platt amendment and Cuban treaty, solemn acts of *the United States*, ratified what is, for the sake of argument only, admitted to have been a tort committed in Cuba; and that these solemn acts of the United States are acts of State and make this supposed tort an act of State, especially from the

standpoint of the jurisdiction of our own courts; that if this law and treaty have no other effect, they take away the jurisdiction of the district court to give judgment for such a tort.

In the case of the *Charming Betsey* no such question is discussed or decided. Judgment was given against a naval officer for mistakenly seizing a Danish vessel he suspected, without sufficient excuse, of being an American vessel engaged in violating the nonintercourse law. It is said that "his orders were such as might well have induced him to consider this as an armed vessel within the law," etc., but it is not stated that his orders were *intended* to embrace such a vessel.

In *Mitchell* v. *Harmony* no such question is discussed or decided; but only whether an officer named Mitchell, under Colonel Doniphan, when the latter invaded the Mexican State of Chihuahua, could justify seizing an American citizen's property by alleging an order from Colonel Doniphan. "If the power exercised by Colonel Doniphan had been *within the limits of a discretion* confided to him by law, his order would have justified the defendant even if the commander had abused his power, or acted from improper motives." Held, that "urgent necessity would alone give him the right; and the verdict finds that the necessity did not exist."

The object of referring to *Grisar* v. *McDowell* is not perceived.

Cammeyer v. *Newton* is another patent dam case, but it was decided that there was no infringement,

because plaintiff's patented device was not used. It was remarked that public employment is no defense; that private property in a patent can not be taken by the Government without just compensation. The question here is not whether property has been taken for a public use or whether Cuba or the United States owes compensation. This is an action of "tort only." The opinion is by Justice Clifford and contains much in the way of dicta.

In *Bates* v. *Clark* it was sought to justify a seizure of whiskey by an Indian agent as being in Indian country when it was not, by alleging an order from the "commandant of the post."

In *Kilbourn* v. *Thompson* it was held that a judicial order by Congress was void and no defense to the Sergeant-at-Arms for arresting Kilbourn for contempt.

United States v. *Lee* is the familiarly known Arlington ejectment case, holding that the owner of land may recover from officers holding property for a public purpose, although the Government can not be sued.

In the Virginia Coupon cases it was said that one who, sued as a wrongdoer, seeks to substitute the State or to defend on the ground that the State has adopted his act and exonerated him, can not make out such a defense by producing a Virginia law which is not a law, but unconstitutional and void, because it impairs the obligation of a contract.

In re Ayers and *McGahey* v. *Virginia* concern this same unconstitutional Virginia legislation and throw

no light on the present question additional to that thrown by the cases just mentioned.

These cases decide what no one will be found to dispute—that a law of Congress regulating foreign commerce is obligatory upon the President and naval officers; that no subordinate officer can authorize one below him to violate the law giving a patentee exclusive rights; that unconstitutional, void laws are of no effect, etc. They do not concern, and therefore can not control, any such situation as we had here with regard to Cuba—a very exceptional situation, bringing into play powers not much discussed in ordinary law reports. The defendant was very different from a mere subordinate military officer when he was governor of this island we had taken over from Spain to organize and deliver to its own inhabitants. The President was not merely commander in chief of an American army. He was not even merely a President dealing with ordinary foreign relations between this country and others. Neither of these personages was, in organizing this foreign country, bound by provisions of the Constitution or laws of the United States. That Constitution and those laws do not undertake to prescribe rules for such a business, either expressly or by implication. Defendant and the President had a practically unlimited discretion.

The Constitution and treaties of the United States and laws of Congress were not in 1899 those of Cuba. The question is whether, in that foreign country, in which all governing powers and principles were yet

to be drawn from nothingness, the whole United States could not order or ratify what was done without committing and continuing a tort within the jurisdiction of this court.

In the recent case of the *Paquete Habana*, a fishing smack captured as prize (189 U. S., 465), this court says:

> In the case of *Little* v. *Barreme* (2 Cr., 170), conversely to this, the United States was not a party and the captor was. All that was decided bearing upon the present point was that instructions from the President did not exonerate the captor from liability to a neutral vessel. As to even that the chief justice hesitated. But we are not aware that it is disputed that when the act of a public officer is authorized or has been adopted by the sovereign power, whatever the immunities of the sovereign, the agent thereafter can not be pursued. (*Lamar* v. *Browne*, 92, U. S., 187, 199); and as to ratification (*Buron* v. *Denman*, 2 Exch., 167, 187, 189; *Secretary of State in Council of India* v. *Kamachee Boye Sahaba*, 13 Moo., P. C., 22, 86. See *Dempsey* v. *Chambers*, 154 Massachusetts, 330, 332). The principle and authority of *Buron* v. *Denman* was recognized and followed by the Court of Claims in *Wiggins* v. *United States*, 3 C. Cl., 412, 423.

The fact that the constitution of England limits the power of the King and makes his ministers and other agents accountable for his unconstitutional acts and orders, has no bearing upon the present question. Of course, a governor of an organized

British colony like Minorca, sent to be its governor, as one is now sent to be governor in Alaska, could not with impunity wantonly imprison or banish a British subject (*Mostyn* v. *Fabrigas*). What gave General Brooke his broad power was not any constitutional autocratic power to govern Americans in the United States vested in the President, who sent Brooke to Cuba, but the extraordinary circumstances, the international situation, the unorganized condition of the sovereign people of Cuba, the duty and the need to bring democratic government in all its parts into existence. The British cases so much discussed by appellant are in no way inconsistent with our contentions. They are dealing with internal British law for the constitutional government of Britons by Britons. The British cases that are in point clearly sustain our contentions.

If it be argued that a tort or wrong, if admitted to be such, ought not, and therefore can not, be converted into an innocent act by any power whatsoever, the answer is not as difficult as may be supposed. Here was an act done in good faith, even if legally a tort, by General Ludlow, confirmed by General Brooke in good faith, confirmed by the Secretary of War on behalf of the President, all in good faith. Now comes the question of turning over the island to the Cubans, for whose benefit the war was begun and this and all the other acts of Ludlow and Brooke as Cuban governors were done. In the most abstract justice, where should the pecuniary liability for the supposed tort lie?

It is alleged by plaintiff that the Government should indemnify Brooke, which is an admission that Brooke ought not to be the one to pay the penalty for the tort. The propriety of a law relieving him and charging the United States is thus conceded.

But here there are two Governments concerned—why should not our Government, by treaty, be relieved from responsibility for the tort as well as General Brooke and for the same reason, that it was acting for another and doing the best it knew how for that other under peculiar and trying circumstances, to wit, for the sovereign people of Cuba?

VIII.

The paragraph of the Revised Statutes conferring jurisdiction on our courts in actions of tort leaves to the general principles of law to determine what actions. That mere grant of jurisdiction to try actions will not be held to give our courts jurisdiction to try a case of trespass to real estate in Cuba. But trespass to real estate is only an example of a class of local actions. The principle is that "If the cause of action is one that might have arisen anywhere, then it is transitory; but if it could only have arisen in one place, then it is local." (Cooley on Torts, 3d Ed., 899.)

We shall do little more than ask the question whether this alleged tort is to be classed with things essentially local or not. Title to real estate can, in one sense, be carried in a man's trunk from one place

to another, but this monopoly of the abattoir at Habana can not be conceived of as other than local, nor is it easy to imagine how a court in New York could give full protection to its owner any more than it could in the case concerning foreign lands. There are money damages allowable in the latter case; but the business is not split up between local and foreign courts for that reason.

There were courts in Cuba and, if this was a tort, then the situation was such that those courts could adjudicate this whole matter. There is nothing to indicate that a properly reasoned decision would not have been respected. See what General Ludlow and Secretary Root say about this. There is nothing in General Brooke's order or conduct indicating that he would set an example of contempt for the courts, and all presumptions are the other way.

The prominence given to the question of there being a ratified or adopted tortious act is out of all proportion to the real importance of that question. That prominence arose from the fact that there was a demurrer, and that we thought then that this proposition, upheld by that court finally, was good upon the demurrer. There are several other propositions we submit with entire confidence.

We trust that our discussion of other questions will not lead to the belief that we have any doubts about our contention as to a trial without a jury. As the Spaniards are fond of answering in argument, *es la punta de vista*. To decide this case rightly a

point of view as novel and as elevated as our national conduct with regard to the struggling people of Cuba ought to be taken. No other point of view will give us the right perspective for the facts, and the law of each case "arises out of the fact."

Respectfully,

CHARLES W. RUSSELL,
Assistant Attorney-General.

APPENDIX A.

[Court of Claims of the United States. No. 28947. Decided October 28, 1907. Guillermo Alvarez y Sanchez v. The United States.]

PEELLE, Ch. J., delivered the opinion of the court:

To the petition filed herein the defendants interpose a demurrer, assigning as ground therefor "that the petition does not allege facts sufficient to constitute a cause of action."

The facts averred and which are material to the case are that the claimant, a native citizen of the island of Porto Rico, did, on the 8th day of April, 1878, purchase from one Florencio Berrios y Lopez for a valuable consideration a certain purchasable office known as "numbered procurador of the courts of first instance of the capital of Porto Rico," at Guayamo, in perpetuity, and that the provisional patent issued therefor by the governor-general of said island was, on or about October 31, 1881, approved by the King of Spain through the minister of the colonies of the Kingdom of Spain in accordance with the laws, practice, and custom of the Kingdom of Spain, by virtue of which it is averred that the claimant "became vested with all the rights and privileges appurtenant to said office under said laws," which said office was then and there reasonably worth $200 per month; and that being thus clothed the claimant exercised all the rights and privileges pertaining to said office of procurador or solicitor from the time said office was confirmed in him until August 31, 1899, when said office was abolished, as hereinafter set forth.

That the United States took possession of said island during their war with Spain and maintained a military government therein from about October, 1898, to April 30, 1900. That while in the possession and military control of said island, to wit, December 10, 1898, the treaty of peace between the United States and the Kingdom of Spain was concluded, and having been signed by the respective plenipotentiaries at Paris was subsequently ratified by the respective Governments, which ratifications were on April 11, 1899, exchanged at the city of Washington and on the same day proclaimed by the President.

That by virtue of article 2 of said treaty the island of Porto Rico was ceded to the United States; and by article 8 is was "declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, can not in any respect impair the property or rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals of whatsoever nationality such individuals may be," etc.

That the office so purchased and held by the claimant was on said 31st day of August, 1899, abolished by General Order No. 134, issued by General Davis, in command of said island as military governor thereof, paragraphs 11, 12, and 13 of which are as follows:

"XI. The office of solicitor ("procurador") is *abolished*. Those who have heretofore practiced as such before any court and are of good repute shall, in default of lawyers, have the right to be appointed municipal judges or clerks of municipal courts.

"XII. Hereafter litigants who do not appear personally shall be represented before the Supreme Court and district courts *exclusively by a lawyer*, no powers of attorney being necessary therefor; it shall be the duty of the courts to suspend from the practice of his profession any lawyer who shall, without authority, assume to represent a litigant; but this shall not affect the civil or criminal liability which such lawyer may thereby incur.

"In the municipal courts, litigants may represent themselves or may be represented by an attorney in fact, resident of the place.

"XIII. For the purpose of conducting the proceedings, lawyers may make use of such agents as they may by writing designate to the court."

That said order was issued without any notice whatever to the claimant and without complaint as to the manner in which the claimant was exercising the duties of said office.

That thereafter by section 8 of the act of April 12, 1900 (13 Stat. L., 77, 79), being an act entitled "An act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes," Congress ratified among others said order in these words:

"SECTION 8. That the laws and ordinances of Porto Rico now in force shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for Porto

Rico or by act of Congress of the United States * * * ."

That the claimant by virtue of the laws of Spain had a vested property right in and to said office at the time the general order was issued, and that by reason of said order the claimant was deprived of his right to discharge the duties of said office and to receive the emoluments thereof to his loss and damage in the sum of $50,000.

The substance of the facts averred is that the claimant held by purchase in conformity with the laws, usage, and customs of the Kingdom of Spain in force in the island of Porto Rico the office of procurador or solicitor in perpetuity, the salary of which was about $200 per month, and that by virtue thereof he had a vested property right in and to said office when the same was abolished as aforesaid, and that the abolition of said office operated as a taking of private property for public purposes, for which no compensation has been made.

The defendants, without plea thereto, raise the question of jurisdiction, claiming, in substance, first, that the act of the commanding general as military governor in abolishing the office so held by the claimant was wrongful and unlawful and, therefore, tortious, and being tortious this court is without jurisdiction. We can not agree with the defendants that the act abolishing said office was unlawful or wrongful, though so averred in paragraph 10 of the petition. The order issued abolishing the office was in conformity with the laws and usages governing the change or modification of the laws of newly acquired territory by conquest or cession; and being within the possession and rightful powers of the United States as the conqueror, the act abolishing the office was not tortious,

and for that reason the defendants' contention can not be sustained.

Second, the defendants further contend that whatever claim exists in favor of the claimant grows out of and is dependent upon the treaty between the United States and the Kingdom of Spain, by which said island was ceded to the United States, and that therefore under Revised Statutes, section 1066, this court is prohibited from taking jurisdiction. But even if said section has not been repealed by the Tucker Act, we think the contention is untenable because the claim as averred, if it exists, arises out of the act of the general in command of said island as military governor in abolishing the office, and not out of the treaty.

If, when the office was abolished, the claimant had any property right therein, then such right was preserved to him by article 8 of the treaty; but in the view we take the claimant had no property right in the office at the time of the issuance of said order; and having no property right therein, there is no claim growing out of or dependent upon the treaty; hence the defendants' contention can not be sustained.

This brings us to the main question in the case, i. e., Did the claimant at the time of the issuance of the order abolishing the office have any property right in the office which he held; and, if so, did said order operate to deprive him thereof for the public use?

During the war with Spain, the United States, in the exercise of their belligerent right, took possession by military force of the island of Porto Rico, then under the dominion and sovereignty of Spain, and, as averred in paragraph 9 of the petition, maintained a military government in said island from about October, 1898, to April 30, 1900.

When the United States thus took and maintained possession of said island the sovereignty of Spain was thereby appropriated by them, and the inhabitants of said island became subject to the will of the United States, though their private rights and their relations to each other remained the same. (*The Fama*, 5 C. Rob., 126; *United States* v. *Percheman*, 7 Peters, 86; *United States* v. *Hayward*, 5 Gallison, 52.)

And as the military occupation of said island was firm, the United States, by virtue thereof, acquired all the rights of the displaced sovereignty, including the right to acquire complete title at least to all movable property of a public character belonging to Spain, and as well the public offices therein having to do with the administration and execution of the laws in said island. (*United States* v. *Rice*, 4 Wheat., 246–254; *Fleming* v. *Page*, 9 How., 603–615.)

When the treaty of Paris of December 10, 1898 (30 Stat. L., 1754), was negotiated, the principle of *uti possidetis* was recognized, i. e., the right to retain possession of the territory acquired by force during the war, and as there is no stipulation in the treaty to the contrary, the island was left in the state in which it was found. Hence the title of the conqueror in the public movable property as well as to the public offices created by the sovereignty of Spain could not thereafter be questioned. (*Wheaton's International Law* sec. 545).

However, whether the island be considered as acquired by conquest or by cession on the basis of possession of the territory by force, the inhabitants in either case became subject to the sovereignty of the United States, the difference in substance being that in case of conquest confirmed by a treaty grounded on the principle of *uti possidetis*, the sover-

eignty is appropriated, while if acquired by expressed cession the sovereignty is transferred by the act of the state making the cession. (*Hall's International Law*, sec. 206.) The former, however, was the course which Spain was forced to pursue; that is, by virtue of the military possession of the island, Spain was forced, as a condition of peace, to cede to the United States the island so acquired and held, not that the cession was necessary to give to the United States the sovereign control of the island, but it operated to confirm in them all the rights which they had theretofore acquired by conquest.

The release of the island from the sovereignty of Spain, whether effected by coercion or by conquest, imposed no obligation upon the United States to indemnify those who may have suffered loss of property by such cession. (1 *Kent's Commentaries*, p. 178.) If, therefore, the claimant's loss of property in the office he held by purchase was due to the cession so made, rather than by conquest, no liability attached to the United States to make compensation therefor.

Conceding that prior to the conquest the claimant had, as between himself and Spain, a property right in the office, such right under the laws of Spain existed only by virtue of said office being a salable one in perpetuity, which office and tenure rested wholly in the sovereignty of Spain, so that when the sovereignty of Spain was displaced and superseded by the sovereignty of the United States and confirmed by the treaty without any words therein making the office perpetual in the claimant under the sovereignty of the United States, all right of property in and to said office was lost by the withdrawal of the sovereignty of Spain.

After the conquest of the island and the confirmation thereof by the treaty as aforesaid, the claimant, if he continued to hold said office, did so at the sufferance and will of the United States, and no right of property in said office can be predicated on such continuance in office.

The office so held by the claimant, as well as all other offices having to do with the execution and administration of the laws in force in said island, were subject to the will and control of the United States exercised through the President as commander in chief of the Army and Navy of the United States, or the Congress; and being so subject, and there being no restrictive words in the treaty, the claimant could have been removed from office or the office abolished, as was done at the will of the President acting through the military governor, without imposing upon the United States any obligation to compensate the incumbent of said office for any loss he may have sustained thereby. True, under the rules of international law, the laws, uses, and municipal regulations in force in the island at the time of the conquest or cession remained in force until changed by the new sovereign. (*Mitchell* v. *The United States*, 9 Peters, 711–735.) But such change is an inherent right to be exercised at the will of the conqueror without condition or restriction unless imposed by the terms of the treaty.

As no right of property in the office held by the claimant was reserved to him by the treaty, none survived it, and, therefore, when the office was abolished, the claimant had no property right therein which was the subject of a taking for public use.

The provisions of article 8 of the treaty, upon which the claimant relies for the preservation of his

right of property, are merely declaratory of the rights which belong to the inhabitants of a territory acquired by conquest or treaty. That is to say, their rights of property not taken from them by order of the conqueror remain undisturbed. In other words, as before stated, the cession or conquest of territory does not affect the rights of private property. (*The Fama*, 5 C. Rob., *supra*.)

But in the present case, as the claimant's right of property was annexed to the public office which he held by purchase in perpetuity and existed wholly in the sovereignty of Spain, such right was exceptional, and in the absence of any words making the office perpetual in the claimant under the sovereignty of the United States, was taken away by the act of Spain when she withdrew her sovereignty. In other words, the claimant's exceptional right of property in the office which he held was not preserved to him by the terms of the treaty; and not being within the ordinary rules protecting the private property of the inhabitants of territory acquired by conquest or cession, he stands on no better terms than other public officers in said territory.

We have thus considered the case upon the theory of the claimant having, as between himself and Spain, a property right in the office which he held, though under the laws of the United States such office is a public trust in which the incumbent can have no property interest. (*United States* v. *Hartwell*, 6 Wall., 385–393.)

Nor is a public office with us the subject of sale, purchase, or barter. (*Taylor* v. *Beckman*, 178 U.S., 548–577.)

Nor can such office be termed a hereditament, or a thing capable of being inherited. (*3d Kent's Commentaries*, 454.)

The right to exercise an office in the United States is not based upon contract or grant, but is conferred as a trust to be exercised for the public benefit. (*United States* v. *Hartwell*, *supra*.) True, some of our States proceed upon the theory of the incumbent having a property right in the office of which he can not be deprived without the judgment of a court, but such view has no foundation in a representative government. (*Anderson's Law Dictionary*, 727; *State ex rel. Atty. Gen.* v. *Hawkins*, 44 Ohio St., 199; *Donahue* v. *County of Will*, 100 Ill., 94.)

But we need not pursue the question any further as there is no language in the treaty perpetuating the office in the claimant, and therefore it must be held that in respect to his right to the office in question he stands upon the same ground as other public officers in the island at the time of the cession of the territory.

For the reasons stated the demurrer must be sustained and the petition dismissed, which is accordingly ordered.

HOWRY, J., was not present when this case was tried and took no part in the decision.

APPENDIX B.

Memorandum by the Judge-Advocate-General (Davis.)

(A)

WASHINGTON, *January 10, 1908.*

The war with Spain was a public war undertaken in pursuance of an appropriate declaration by Congress, involving the invasion and occupation of foreign territory and the acquisition of territory by conquest perfected by treaty.

Joint Resolution No. 24 of April 20, 1898 (30 Stat. L., 738), provided that—

> Whereas the abhorrent conditions which have existed for more than three years in the island of Cuba, so near our own borders, have shocked the moral sense of the people of the United States, have been a disgrace to Christian civilization, culminating, as they have, in the destruction of a United States battle ship, with two hundred and sixty-six of its officers and crew, while on a friendly visit in the harbor of Habana, and can not longer be endured, as has been set forth by the President of the United States in his message to Congress of April eleventh, eighteen hundred and ninety-eight, upon which the action of Congress was invited: Therefore,
>
> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, First, that the people of the island of Cuba are, and of right ought to be, free and independent.
>
> Second, that it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the

> Government of Spain at once relinquish its authority and government in the island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.
>
> Third, that the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.
>
> Fourth, that the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people.
>
> (30 Stat. L., 738–9.)

The character of the power above exercised is well described in *Fleming* v. *Page*, in which the court says:

> The genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the General Government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens.
>
> A war, therefore, declared by Congress, can never be presumed to be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy's country.
>
> *Fleming* v. *Page* (9 Howard, 614).
>
> Prize cases (2 Black, 635, 668).

The foregoing enactment is, in substance, a conditional declaration of war made by Congress in the exercise of the power vested in it by the Constitution—

> to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.
>
> (Constitution, Art. I, sec. 8, par. 11.)

When Congress in appropriate form makes a formal declaration of war, in the exercise of the authority to that end which is contained in the Constitution, its power under that clause is exhausted. The adoption of the resolution above cited operated to suspend all diplomatic and commercial relations and to establish a state of legal nonintercourse between the belligerent States and their citizens or subjects. With the inauguration and prosecution of hostilities, in pursuance of the declaration, save to provide or withhold the necessary means, the legislative department of the Government had nothing to do.

The employment of the constitutional military forces in the prosecution of the war so formally declared was a matter falling within the jurisdiction of the President, as the commander in chief of the land and naval forces. As to the extent and character of this jurisdiction this court has said:

> "His duty and his power are purely military. As commander in chief he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country and subject it to the sovereignty and authority of the United States. But his conquests do

> not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.
>
> *Fleming* v. *Page* (9 How., 614, 615).

Although the power to declare war, which is vested in Congress by the Constitution, is plenary, the joint resolution containing the declaration may embody other legislation, based upon other clauses of the Constitution; in the enactment of such legislation the President participates by giving or withholding his approval. Such, indeed, was the case in respect to Joint Resolution No. 24, already cited. The third clause of the resolution, which forms no part of the declaration proper, may be regarded as declaratory in character, and as constituting an announcement of policy on the part of the political branches of the Government, which was subject to legislative modification at any time, and the operative effect of which was contingent upon the successful prosecution of the hostilities which were to be instituted by the President, as the commander in chief of the land and naval forces, in execution of the legislative mandate.

Operations in furtherance of the legislative declaration hereinbefore cited were instituted by the President on land and sea. A Spanish fleet was defeated off the southern coast of Cuba, the colonial possessions of Spain in the West Indies were invaded, and, as a result of the operations directed against it, the city and defenses of Santiago were surrendered to the military forces of the United States. An effective military occupation of the eastern portion of the island was established, and a military government in furtherance of such occupation had been instituted there at the date of the armis-

tice which was embodied in the protocol of August 12, 1898.

By the terms of the capitulation entered into on July 16, 1898, between Maj. Gen. William R. Shafter, commanding the United States forces, and Gen. José Toral, commanding the Spanish troops in the district of Santiago, that part of the island of Cuba lying to the east of a line passing through Aserradero dos Palmas, Cauto Abajo, Escondida, Tanamo, and Aquidora, passed into the military possession and occupation of the United States. Instructions for the guidance of the commanding general of the occupying forces were prepared by the President and furnished to the Secretary of War, by whom they were communicated to General Shafter. These instructions contain the following provisions:

EXECUTIVE MANSION,
Washington, July 18, 1898.

The SECRETARY OF WAR:

SIR: The capitulation of Spanish forces in Santiago de Cuba and in the eastern part of the province of Santiago and the occupation of the territory by the forces of the United States render it necessary to instruct the military commander of the United States as to the conduct which he is to observe during the military occupation.

One of the important and most practical problems with which it will be necessary for him to deal is that of the collection and administration of the revenues. You will therefore at once arrange to collect customs duties and port charges on goods and ships entering Santiago or other ports or places coming under our control. For customs dues you will adopt the Spanish schedules as heretofore applied to Spanish products, whether the goods are

shipped from the United States or other country.

You will abolish, also, $1 tax per ton on cargoes imported or exported; require every vessel entering to pay 20 cents per registered ton as port dues; collect present tax of 5 cents per gross ton on iron ore exported; collect charges as per export tariff schedule.

This order is subject to modification at a later date.

WILLIAM MCKINLEY.

At a later hour on the same day the following Executive instructions were communicated to the commanding general of the occupying forces:

EXECUTIVE MANSION,
Washington, July 18, 1898.

The SECRETARY OF WAR.

SIR: The capitulation of the Spanish forces in Santiago de Cuba and in the eastern part of the province of Santiago and the occupation of the territory by the forces of the United States render it necessary to instruct the military commander of the United States as to the conduct which he is to observe during the military occupation.

The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. Under this changed condition of things, the inhabitants, so long as they perform their duties, are entitled to security in their persons and property and in all their private rights and relations. It is my desire that the inhabitants of Cuba should be acquainted with the purpose of the United States to discharge to the fullest extent its obligations in this regard. It will therefore be the duty of the commander of the army of occupation to announce and proclaim

in the most public manner that we come not to make war upon the inhabitants of Cuba, nor upon any party or faction among them, but to protect them in their homes, in their employments, and in their personal and religious rights. All persons who, either by active aid or by honest submission, cooperate with the United States in its efforts to give effect to this beneficent purpose will receive the reward of its support and protection. Our occupation should be as free from severity as possible.

Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of persons and property and provide for the punishment of crime, are considered as continuing in force, *so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent;* and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion. The judges and other officials connected with the administration of justice may, if they accept the supremacy of the United States, continue to administer the ordinary law of the land, as between man and man, under the supervision of the American commander in chief. The native constabulary will, so far as may be practicable, be preserved. The freedom of the people to pursue their accustomed occupations will be abridged only when it may be necessary to do so.

While the rule of conduct of the American commander in chief will be such as has just been defined, it will be his duty to adopt

measures of a different kind if, unfortunately, the course of the people should render such measures indispensable to the maintenance of law and order. He will then possess the power to replace or expel the native officials in part or altogether; to substitute new courts of his own constitution for those that now exist, or to create such new or supplementary tribunals as may be necessary. *In the exercise of these high powers the commander must be guided by his judgment and his experience and a high sense of justice.*

One of the most important and most practical problems with which it will be necessary to deal is that of the treatment of property and the collection and administration of the revenues. It is conceded that all public funds and securities belonging to the government of the country in its own right, and all arms and supplies and other movable property of such government may be seized by the military occupant and converted to his own use. The real property of the State he may hold and administer, at the same time enjoying the revenues thereof, but he is not to destroy it save in the case of military necessity. All public means of transportation, such as telegraph lines, cables, railways, and boats, belonging to the State may be appropriated to his use, but unless in case of military necessity, they are not to be destroyed. All churches and buildings devoted to religious worship and to the arts and sciences, all schoolhouses, are, so far as possible, to be protected, and all destruction or intentional defacement of such places, of historical monuments or archives, or of works of science or art is prohibited, save when required by urgent military necessity.

Private property, whether belonging to individuals or corporations, is to be respected, and

can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways, and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity are not to be retained.

While it is held to be the right of the conqueror to levy contributions upon the enemy in their seaports, towns, or provinces which may be in his military possession by conquest, and to apply the proceeds to defray the expense of the war, this right is to be exercised within such limitations that it may not savor of confiscation. *As the result of military occupation the taxes and duties payable by the inhabitants to the former government become payable to the military occupant, unless he sees fit to substitute for them other rates or modes of contribution to the expenses of the government.* The moneys so collected are to be used for the purpose of paying the expenses of government, under the military occupation, such as the salaries of the judges and the police, and for the payment of the expenses of the army.

Private property taken for the use of the Army is to be paid for, when possible, in cash at a fair valuation, and when payment in cash is not possible receipts are to be given.

All ports and places in Cuba which may be in the actual possession of our land and naval forces will be opened to the commerce of all neutral nations, as well as our own, in articles not contraband of war, upon payment of the prescribed rates of duty which may be in force at the time of the importation.

WILLIAM MCKINLEY.

(Correspondence etc., Vol. 1, pages 159–161.)

In the operation of the protocol of August 12, 1898, the military occupation already established was recog-

nized by the incorporation in that undertaking of a method for the evacuation of the Spanish troops, as the result of which the entire island passed into the military occupation of the United States. In the treaty of December 10, 1898, the military occupation so established was recognized in Article I hereinafter cited, and the future military occupation of the island by the United States was specifically provided for.

The protocol of August 12, 1898, contained the following requirements:

> ARTICLE 1. Spain will relinquish all claim of sovereignty over and title to Cuba.
>
> * * * * *
>
> ARTICLE 4. Spain will immediately evacuate Cuba, Porto Rico, and other islands now under Spanish sovereignty in the West Indies; and to this end each Government will, within ten days after the signing of this protocol, appoint commissioners, and the commissioners so appointed shall, within thirty days after the signing of this protocol, meet at Habana for the purpose of arranging and carrying out the details of the aforesaid evacuation of Cuba and the adjacent Spanish islands; and each Government will, within ten days after the signing of this protocol, also appoint other commissioners, who shall, within thirty days after the signing of this protocol, meet at San Juan, in Porto Rico, for the purpose of arranging and carrying out the details of the aforesaid evacuation of Porto Rico and other islands now under Spanish sovereignty in the West Indies.
>
> * * * * *
>
> (30 Stat. L., 1742).

The protocol above cited was in the nature of a general truce or armistice, which made express provision for the negotiation of a treaty of peace. Its

effects in the island of Cuba were to enlarge the field of the existing military occupation and to provide for the withdrawal of the Spanish troops which had been engaged in the defense of the island; but it in nowise changed the character of the occupation, or of the military government which had been established by the President, as commander in chief, and carried on by the generals acting under the President in command of the occupying forces.

The protocol itself is silent as to the character of the military government which should be established by the United States over the territory which was to be evacuated by the military forces of Spain in the execution of that undertaking. That the existing government by military occupation was not affected by it is indicated by the following extracts from the correspondence between M. Cambon, the French Ambassador, and the Acting Secretary of State, in which Ambassador Cambon, on August 15, 1898, submitted to the Department of State the following inquiries:

> 1. May the postal service by Spanish steamers be reestablished between Spain and Cuba, Porto Rico, and the Philippines?
>
> 2. Will Spanish merchants be permitted to send supplies in Spanish bottoms to Cuba, Porto Rico, and the Philippines?
>
> 3. Will the Spanish tank steamer *Cadagna*, chartered by French merchants and now lying in Havre, be permitted to proceed to Philadelphia to take mineral oil for industrial purposes?
>
> (Treaty of Peace, page 307.)

To which, under date of August 17, 1898, the Acting Secretary of State replied:

> It is understood that these inquiries are made with reference to the fact that, although

a suspension of hostilities between the United States and Spain has been proclaimed, the state of war between the two countries still continues, and that intercourse between them not having been formally restored must, so far as it is allowed, be the subject of special understanding.

With this observation, I proceed to answer your inquiries in the order in which they have been stated.

1. This Government will interpose no obstacle to the reestablishment of the postal service by Spanish steamers between Spain on the one side and Cuba, Porto Rico, and the Philippines on the other.

2. The United States will not object to the importation of supplies in Spanish bottoms to Cuba and the Philippines, but it has been decided to reserve the importation of supplies from the United States to Porto Rico to American vessels.

3. The Spanish tank steamer *Cadagna*, chartered by French merchants and now lying at Havre, will be permitted to proceed to Philadelphia and to take mineral oil for industrial purposes, provided such oil is not to be transported to Porto Rico.

Treaty of peace, p. 307; see, also, Cambon to Day, p. 310.

The occupation so established and conducted continued until the evacuation of the island by the military forces of the United States on May 20, 1902. It was expressly recognized in Article I of the treaty, in which the Government of the United States charges itself with certain duties, the performance of which constitutes the essential functions of a military government established in the occupied territory of the enemy.

On December 13, 1898, Major-General Brooke was appointed military governor of the island in the operation of the following order:

WAR DEPARTMENT,
Washington, December 13, 1898.

By direction of the President, a division to be known as the division of Cuba, consisting of the geographical departments and provinces of the island of Cuba, with headquarters in the city of Havana, is hereby created, under command of Maj. Gen. John R. Brooke, U. S. Army, who, in addition to command of the troops in the division, will exercise the authority of military governor of the island. * * *

R. A. ALGER,
Secretary of War.

(G. O. No. 184, Headquarters of the Army, A. G. O., 1898.)

On December 28, 1898, General Brooke assumed the command to which he had been assigned which, as has been seen, included the office of the military governor, in the following order:

General Orders, No. 1.]

HEADQUARTERS DIVISION OF CUBA,
Havana, December 28, 1898.

In accordance with the order of the President, as published in General Orders, No. 184, dated Headquarters of the Army, Adjutant-General's Office, Washington, December 13, 1898, the undersigned hereby assumes command of the division of Cuba, and by the requirements of the same order will exercise the authority of military governor of the island of Cuba.

JOHN R. BROOKE,
Major-General, U. S. Army.

(G. O., No. 1, annual report, major-general commanding, page 122.)

On January 1, 1899, and in furtherance of the military occupation, the following proclamation was issued by Major General Brooke:

HEADQUARTERS DIVISION OF CUBA,
Havana, January 1, 1899.

PROCLAMATION.

To the people of Cuba:

Coming among you as the representative of the President, in furtherance and in continuance of the humane purpose with which my country interfered to put an end to the distressing condition in this island, I deem it proper to say that the object of the present Government is to give protection to the people, security to person and property, to restore confidence, to encourage the people to resume the pursuits of peace, to build up waste plantations, to resume commercial traffic; and to afford full protection in the exercise of all civil and religious rights.

To this end the protection of the United States Government will be directed, and every possible provision made to carry out these objects through the channels of civil administration, although under military control, in the interest and for the benefit of all the people of Cuba, and those possessed of rights and property in the island.

The civil and criminal code which prevailed prior to the relinquishment of Spanish sovereignty will remain in force, with such modifications and changes as may from time to time be found necessary in the interest of good government.

The people of Cuba, without regard to previous affiliations, are invited and urged to cooperate in these objects by the exercise of moderation, conciliation, and good will one

toward another, and a hearty accord in our humanitarian purposes will insure kind and beneficent government.

The military governor of the island will always be pleased to confer with those who may desire to consult him on matters of public interest.

JOHN R. BROOKE,
Major-General, Commanding Division of Cuba, and Military Governor.

(1)

The occupation of Cuba was a military occupation, which was fully recognized and authorized by the laws of war.

Resistance to the arms of the United States had ceased, in fact, at the surrender of the city of Santiago and its dependencies on July 16, 1898, and an extension of the limits of the military occupation to include the entire island of Cuba, by the evacuation of the island by the Spanish military forces, was provided for in the protocol or armistice of August 12, 1898. The war status had been terminated by the treaty of peace of December 10, 1898.

The authority of a belligerent to establish a government by military occupation is well and clearly set forth by General Halleck in his "International Law," in which he says:

> The right of one belligerent to occupy and govern the territory of the enemy while in its military possession, is one of the incidents of war, and flows directly from the right to conquer. *We, therefore, do not look to the constitution, or political institutions of the conqueror,*

for authority to establish a government for the territory of the enemy in his possession, during its military occupation, nor for the rules by which the powers of such government are regulated and limited. Such authority, and such rules, are derived directly from the laws of war, as established by the usage of the world, and confirmed by the writings of publicists, and the decisions of courts—in fine, from the law of nations. But, when the conquest is made complete, in whatsoever mode, the right to govern the acquired territory follows as the inevitable consequence of the right of acquisition, and the character, form, and powers of the government established over such conquered territory, are determined by the constitution and laws of the state which acquires it, or with which it is incorporated.

The government established over an enemy's territory during its military occupation, may exercise all the powers given by the laws of war to the conqueror over the conquered, and is subject to all the restrictions which that code imposes. It is of little consequence whether such government be called a *military* or a *civil* government, its character is the same, and the source of its authority the same; in either case, it is a government imposed by the laws of war, and so far as it concerns the inhabitants of such territory, or the rest of the world, those laws alone determine the legality or illegality of its acts. But the conquering state may, of its own will, whether expressed in its constitution, or in its laws, impose restrictions additional to those established by the usage of nations, conferring upon the inhabitants of the territory so occupied privileges and rights to which they are not strictly entitled by the laws of war; and, if such government of military occupation vio-

late these additional restrictions so imposed, it is accountable to the power which established it, but not to the rest of the world.

Halleck, ch. XXXII, sec. 1.
Fleming v. *Page*, 9 Howard, 613.
Cross v. *Harrison*, 16 Ibid, 160.
Vattel, liv. 3, ch. 13, sec. 197.

The conduct of the commanding general of the occupying forces was subject to the control of the President, as commander in chief. His powers were also exercised in subordination to such enactments of Congress as were made applicable thereto in specific acts of constitutional legislation.

The instructions of the President to the commanding general of the occupying forces are embodied in the two sets of instructions of July 18, 1898, hereinbefore cited, which were communicated to that officer through the Adjutant-General of the Army, and in the following Executive utterances:

EXECUTIVE MANSION,
Washington, December 22, 1898.

Until otherwise ordered, no grants or concessions of public or corporate rights or franchises for the construction of public or *quasi* public works, such as railroads, tramways, telegraph and telephone lines, waterworks, gas works, electric light lines, etc., shall be made by any municipal or other local governmental authority or body in Cuba, except upon the approval of the major-general commanding the military forces of the United States in Cuba, who shall, before approving any such grant or concession, be so especially authorized by the Secretary of War.

WILLIAM MCKINLEY.

(General Orders, No. 188, A. G. O., War Department, Dec. 24, 1898.)

EXECUTIVE MANSION,
Washington, December 30, 1898.

BROOKE, *Major-General Commanding,*
Havana.

The President is pleased with your proclamation, but makes a few verbal changes, leaving it to read as follows: * * * here follows text of proclamation (page 10, ante). * * *

H. C. CORBIN, *Adjutant-General.*

The authority of a belligerent occupant in this regard is well explained by Dana in his edition of Wheaton's International Law, in which he says:

> Whether the laws which the occupying power establishes over a conquered place are those of the conquering country, or such other and different laws as that power shall choose to establish, is a matter of internal and not of international law. Under the Constitution of the United States, a place so held is not a State of the Union, and the general laws of the Union do not, *proprio vigore*, extend over it; but it is simply a district held by the military power, for the belligerent purposes of the Union, and is subject to such laws as the belligerent authorities of the Union may establish. Congress is considered as having a general authority to make laws for the government of such places, under its authority over martial and military law; and, in the absence of acts of Congress, the President, as commander in chief, establishes such rules as he sees fit.
>
> Halleck's International Law, Ch. XXXII, secs. 8–9, pp. 784–6.
>
> *Fleming* v. *Page*, How. 9, 615.
>
> *Cross* v. *Harrison*, How. 16, 164.

It is well established that Congress, in the exercise of the war powers which are vested in it by the Constitution, may legislate in respect to territory of the enemy, which, in the operation of conquest, or of conquest supplemented by a treaty, has passed into the control of the United States. The military government established by the President in the island of Cuba had many incidents in common with the military governments established by the President, as commander in chief, in the States lately in rebellion, which were expressly recognized in the "reconstruction acts" of March 2, 1867 (14 Stat. L., 428), and March 28, 1867 (15 Stat. L., 2). These acts, in addition to an express recognition of the existing governments by military occupation, charged the generals commanding the occupying forces with certain duties in respect to the reestablishment of the State governments.

What is known as the "Platt amendment" to the act of March 2, 1901 (31 Stat. L., 897), had some incidents in common with the "reconstruction acts" and created a status in the island of Cuba in some respects analogous to that existing in the Southern States at the close of the war of the rebellion; and the legislation therein embodied was calculated to guide the people of Cuba in the adoption of a constitution and in the organization of a government thereunder.

The commanding general of the occupying forces was also controlled, in the exercise of his authority as military governor, by the requirements of the act of March 3, 1899, which provided that:

> No property, franchises, or concessions of any kind whatever shall be granted by the United States, or by any military or other

> authority whatever, in the island of Cuba during the occupation thereof by the United States.
>
> (Sec. 2, act of March 3, 1899, 30 Stats., 1074.)

(3.)

The powers and duties of the military government first established in Cuba at the invasion of the Santiago province by the military forces of the United States under command of Major-General Shafter, and subsequently extended over the entire island in the operation of the armistice, which is embodied in the protocol of August 10, 1898, are measured by the first article of the treaty above cited, and by the rules of international law which are therein recognized and made operative.

Article I of the treaty of December 10, 1898, provides that:

> Spain relinquishes all claim of sovereignty over and title to Cuba.
>
> And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.
>
> (Art. I, treaty of December 10, 1898; 30 Stats., 1754.)

The article above cited is in furtherance of the terms of the protocol of August 12, 1898, and provides for the performance, by the United States, during the period of its occupation of the island, of such duties having to do with the protection of life and property as flowed, under international law, from the fact of its occupation.

It is conceded that the President, as commander in chief, and the Congress in the exercise of its constitutional war powers, might, and in fact did prescribe additional rules for the guidance of the military governor in the conduct of the occupation. But the powers so exercised are derived, not from international law, but from the municipal law of the United States into whose authority the sovereignty of the island passed in the operation of the treaty.

That this view is correct is indicated by the protocols of the meetings of the commissioners charged with the preparation of a treaty of peace. At the meeting of October 7, 1898, the following articles were submitted by the Spanish commissioners:

ARTICLE II.

> The relinquishment and transfer made by Her Catholic Majesty, and accepted by the United States of America, embrace:
>
> First. All the prerogatives, powers, and rights, which, as an integral part of the sovereignty, belong to Her Catholic Majesty both over the island of Cuba and over its inhabitants.
>
> Second. All charges and obligations of every kind in existence at the time of the ratification of this treaty of peace, which the Crown of Spain and her authorities in the island of Cuba may have contracted lawfully in the exercise of the sovereignty hereby relinquished and transferred, and which as such constitute an integral part thereof. (Message of President of January 4, 1899, S. Doc. No. 62, 55th Congress, 3d sess., p. 28.)

ART. IV.

> In order to establish the charges and obligations of all kinds which the Crown of Spain

cedes and transfers as a part of its sovereignty over the island of Cuba to the United States, and which the latter accept, the two rules following will be observed:

First. The charges and obligations to be transferred must have been levied and imposed in constitutional form and in the exercise of its legitimate powers by the Crown of Spain, as the sovereign of the island of Cuba, or by its lawful authorities in the exercise of their respective powers prior to the ratification of this treaty.

Second. The creation or establishment of such charges or obligations must have been for the service of the island of Cuba, or chargeable to its own individual treasury. (Ibid., 29.)

To these the following objections were urged by the commissioners of the United States:

The American commissioners regret to find in the articles presented by the Spanish commissioners on the 7th instant a departure from the terms of the protocol in the following particulars:

To the unconditional engagement of the protocol to relinquish all claim of sovereignty over and title to Cuba, they have proposed conditions:

1. That Spain shall transfer her sovereignty over the island to the United States, and that the United States "shall in their turn transfer it at the proper time to the Cuban people."

2. That this transfer shall be made upon the conditions to be established in the treaty between the United States and Spain.

3. That the United States shall engage itself to Spain for the performance of these conditions.

In place of the unconditional relinquishment agreed to in the protocol, it is proposed that the relinquishment now offered shall embrace all charges of every kind which Spain

and her authorities in Cuba have lawfully contracted heretofore, and may hereafter contract, prior to the ratification of the treaty of peace; and these "charges and obligations," past, present, and future, which it is *proposed to "transfer" to the United States, are declared to include debts, civil and ecclesiastical salaries, and civil and military pensions, ostensibly in arrears, as well as yet to accrue.*

To the American commissioners this appears to be not a proposition to "relinquish all claim of sovereignty over and title to Cuba," but in substance a proposition to "transfer" to the United States and in turn to Cuba a mass of Spanish charges and obligations.

It is difficult to perceive by what logic an indebtedness contracted for any purpose can be deemed part of the sovereignty of Spain over the island of Cuba. In the article proposed it is attempted to yoke with the transfer of sovereignty an obligation to assume an indebtedness arising out of the relations of Spain to Cuba. The unconditional relinquishment of sovereignty by Spain stipulated for in the protocol is to be changed into an engagement by the United States to accept the sovereignty burdened with a large mass of outstanding indebtedness.

It is proper to say that if during the negotiations resulting in the conclusion of the protocol Spain had proposed to add to it stipulations in regard to Cuba such as those now put forward, the proposal, unless abandoned, would have terminated the negotiations.

The American commissioners, therefore, speaking for their Government, must decline to accept the burden which it is now proposed shall be gratuitously assumed. (Ibid., 33–34.)

At the session of October 17, 1898, the Spanish commissioners stated that:

> Although the articles presented by them were not couched in the same words as the

protocol of August 12, 1898, and the propositions in the notes preceding its conclusion, the sense was, in their opinion, the same. Still, they were ready to withdraw their articles, and to substitute for them articles more nearly in conformity with the language of the protocol. (Ibid., 52.)

Whereupon the following proposition was submitted by the commissioners of the United States:

As the Spanish commissioners strenuously urge that the acceptance of sovereignty includes the assumption of the so-called Cuban debt, and as it is evident that this question divides the commission and stays its progress, the American commissioners, having carefully considered the arguments of the Spanish commissioners, must again and finally decline to accept this burden either for the United States or for Cuba. In the articles proposed by the American commissioners on the third instant there were contained certain stipulations which, the American commissioners believed, while not enlarging the protocol, would effectually preserve the evidence of title to property and make clear the nature of public property and rights included in the relinquishment of sovereignty and title. It having been urged that these, no less than the articles proposed by the Spanish commissioners, enlarge the terms of the protocol, the American commissioners are now prepared, for the purpose of disposing of the question of Cuba, Porto Rico, and Guam, simply to embody in the treaty the precise stipulations of the protocol on those subjects, neither adding thereto nor subtracting therefrom.

The American commissioners, therefore, offer as a substitute for the articles heretofore presented by them the following:

ARTICLE 1. Spain hereby relinquishes all claim of sovereignty over and title to Cuba.

ARTICLE II. Spain hereby cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also the island of Guam in the Ladrones. (Ibid., 53.)

At the conference of October 21, 1898, the Spanish commissioners made the following reply:

> The Spanish commissioners stated that they regretted to reject the proposals presented by the American commissioners at the last session, and that they therefore presented certain articles as a substitute for the articles previously submitted by them in relation to Cuba and Porto Rico. (Ibid., 54.)

At the same meeting the following revised draft of articles was submitted by the Spanish commission:

ARTICLE I.

Her Catholic Majesty, the Queen Regent of Spain, in the name of her august son Don Alfonzo XIII, King of Spain, thereunto constitutionally authorized by the Cortes of the Kingdom, relinquishes her sovereignty over and title to Cuba.

The United States of America, accepting said relinquishment, receive the island of Cuba from Spain to lend it aid and guidance and hold it under their control and government until, the pacification thereof realized, they leave said control and government to the Cuban people.

ARTICLE II.

The relinquishment and transfer made by Her Catholic Majesty and accepted by the United States of America embrace:

1. All prerogatives, attributes, and rights pertaining to Her Catholic Majesty as part of

her sovereignty over the island of Cuba and its inhabitants.

2. All pecuniary charges and obligations outstanding upon the ratification of this treaty of peace which, after a minute examination into their origin, purpose, and the conditions of their creation, should be held, pursuant to strict law and undeniable equity, to be distinct from such as are properly and peculiarly chargeable to the treasury of the peninsula, and to have been always properly and peculiarly Cuban.

To make the strict examination provided for in the foregoing paragraph, the two high contracting parties shall name a commission of competent and impartial persons in the manner to be determined in the proper article of this treaty. (Ibid., 56–7.)

At the meeting of October 24 the following reply was submitted by the American commissioners:

The American commissioners stated that they had carefully considered the articles tendered by the Spanish commissioners at the last meeting, by which, while Spain was to relinquish sovereignty over Cuba, such relinquishment was to be accepted by the United States and was to include such charges and obligations outstanding at the ratification of the treaty as should be held by a commission not to be properly and peculiarly chargeable to the treasury of the peninsula, but to be properly and peculiarly Cuban, and that they must reject the articles in question as well as any articles that required the United States to assume, either for itself or for Cuba, the so-called Cuban debt. They were willing, however, to add to the article in which Spain relinquished sovereignty over and title to Cuba, a suitable stipulation by which the United States would assume the

> obligations as to the protection of life and property imposed by its occupation, so long as such occupation should continue. (Ibid., 58–9.)

At the meeting of October 26 the following inquiry was propounded by the American commissioners:

> The American commissioners, after the reading of this paper, inquired whether they were to understand that the Spanish commissioners accepted the articles previously presented by them as to Cuba, Porto Rico, and Guam.
>
> The Spanish commissioners replied that they accepted them in the sense stated in the paper—provisionally, subject to the conclusion of a treaty of peace. (Ibid., 62.)

At the final meeting of the commission the following declaration was made in behalf of the American commissioners:

> The American commission felt constrained to reject the articles tendered by the Spanish commissioners in respect to contracts entered into for public works and services. It took this step because the nature, extent, and binding obligation of these contracts are unknown to the American commissioners, and they again disclaim any purpose of their Government to disregard the obligations of international law in respect to such contracts as investigation may show to be valid and binding upon the United States as successor in sovereignty in the ceded territory. (Ibid., 262.)

The several articles constituting the treaty, from which the clauses to which the American commissioners had objected were entirely excluded, were then formally adopted and signed by the delegates plenipotentiary of the United States and Spain.

(4.)

It was the purpose of Article VIII of the treaty to convey to the Government of the United States certain real property, the title and ownership of which had theretofore vested in the Crown and Government of Spain, and the second paragraph of said Article VIII was intended to operate as an excepting clause and to exempt the property of municipalities, associations, and private individuals from passing to the Government of the United States under the grant or conveyance which is embodied in the first paragraph of that article.

It is denied that said second clause of Article VIII establishes a rule in respect to private property, the treatment of which is fully covered by the requirements of Article I and by the rules of international law which are therein made applicable.

In the island of Cuba, as elsewhere in the Spanish colonies and dependencies, there had been repeated changes in legislative and administrative policy, the effect of which has been to make it necessary in the preparation of the treaty to resort to a conventional clause of interpretation, with a view to determine what classes of municipal, corporate, and private property was not to pass into the possession of the United States as constituting a part of the property of the Crown of Spain. The second paragraph of Article VIII does not operate as an independant conveyance, but as a restriction upon the conveyance of certain immovable property theretofore belonging to the Crown, which is made the subject of the preceding paragraph.

(5.)

The legislative and other governmental powers which were vested in the commanding general of the occupying forces were not controlled in their exercise by the requirements of General Orders, No. 100, Adjutant-General's Office, of 1863.

General Orders, No. 100, Adjutant-General's Office, of 1863, which is conceded to have been in force during the war with Spain, contained executive instructions which were expressly restricted in their operation to the "armies of the United States in the field;" that is, to the armies engaged in the conduct of active military operations against the enemy. At the date of the revocation of the O'Reilly privilege on August 10, 1899, no military operations, to which the requirements of General Orders, No. 100, of 1863, were applicable, were in progress in any part of the island of Cuba, which, at that date, had been evacuated by the Spanish forces in the operation of articles 4 and 5 of the protocol of August 12, 1898.

No insurrection or rebellion against the authority of the United States was in existence at the date when the order of August 10, 1899, became operative, and the treaty of peace had been in operation for more than six months, that is, since December 10, 1898. As no military operations against an enemy were in progress, General Orders, No. 100, Adjutant-General's Office, of 1863, which is expressly restricted in its application to time of war, had ceased to be operative. It is interesting to note that General Orders, No. 100, of 1863, was also replaced on July 31, 1899, by the requirements of the Hague convention in regard to the laws and usages of war on land.

(6.)

The action taken by Major-General Brooke in the revocation of the O'Reilly privilege was not the act of a mere military officer, or even of a commanding officer of an organized body of troops serving in Cuba in the operation of competent executive orders; it was a formal legislative act, involving an exercise of legislative power on the part of the commanding general of the forces in military occupation of the island of Cuba, in whom, during the pendency of the occupation, the sovereign powers formally exercised by the Crown of Spain were lawfully vested.

In *Cross* v. *Harrison* this court said, in speaking of the government established in California by Colonel Mason during the war with Mexico:

> The government, of which Colonel Mason was the executive, had its origin in the lawful exercise of a belligerent right over a conquered territory. It had been instituted during the war by the command of the President of the United States. It was the government when the territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is, that it was meant to be continued until it had been legislatively changed. (*Cross* v. *Harrison*, 16 How., 193.)

The authorities agree in recognizing two somewhat different political conditions as existing, at different times, in territory occupied by a belligerent in time of war, which is subsequently acquired by conquest, or,

as in the case at bar, by conquest perfected by treaty. These relate (1) to the government of military occupation, properly speaking, which exists during the pendency of military operations; and (2) to the governmental arrangements, usually involving an extension of the existing military government, so as to cover the period intervening between the date of the complete conquest or treaty of peace and the date when the newly conquered or acquired territories are incorporated into the dominions of the conqueror. It should be noted that, in the case at bar, the continuance of the military occupation of the island of Cuba after the signature of the treaty of peace is expressly recognized and continued by the treaty of December 10, 1898.

At the date of the treaty, and in its operation, the sovereignty over the island, which Spain had relinquished by the treaty of December 10, 1898, passed to the United States as a trustee for the future government of the island. It did not become a part of the territory of the United States, although it was held by the United States and governed and administered for the benefit of the people of Cuba.

It was therefore the duty of General Brooke, as military governor, to make such changes in the political and municipal laws of Cuba as were calculated to bring the existing legal system within the denomination of a republican government and in harmony with republican institutions. It was equally the duty of the political departments of the United States Government and of their agent and representative in Cuba to take such steps and to make such modifications in existing laws as would be calculated to bring them into harmony with republican institutions. As to the power to accomplish this there

can be no doubt. General Halleck says on this point:

> We have already remarked that the relations of the inhabitants of the conquered territory, *inter se*, are not, in general, changed by the act of conquest and military occupation; *nevertheless, that the conqueror, exercising the powers of a de facto government, may suspend or alter the municipal laws of the conquered territory, and make new ones in their stead.* Such changes are of two kinds, viz, those which relate to a suspension of civil rights and civil remedies, and the substitution of military laws, and military courts and proceedings; and those which relate to the introduction of new municipal laws, and new legal remedies and civil proceedings. There can be no doubt that when the war ceases the inhabitants of the ceded conquered territory cease to be governed by the code of war. Although the government of military occupation may continue, the rules of its authority are essentially changed. It no longer administers the laws of war, but only those of peace. The governed are no longer subject to the severity of the code military, but are remitted to their rights, privileges, and immunities under the code civil. Hence, any laws, rules, or regulations introduced by the government of military occupation during the war which infringe upon the civil rights of the inhabitants, necessarily cease with the war in which they had their origin and from which they derived their force. But if this government, during military occupation, has granted to the inhabitants rights which they did not possess under their former laws, or if it has abolished former municipal laws deemed odious and oppressive—as, for example, laws conferring privileges of rank, or distinguishing

between the civil rights of classes and castes—these will not be revived as a necessary consequence of peace. *They may, however, be revived as a consequence of the institutions and laws of the new sovereignty; and even rights and immunities, not suspended or infringed during the war, may entirely cease on the treaty of peace, as a consequence of the cession, and the introduction of the civil government, and civil jurisprudence of the new sovereign.* (Halleck, Inter. Law, ch. 33, sec. 18.)

Elsewhere the same author says:

> When a country which has been conquered is ceded to the conqueror by the treaty of peace, the *plenum et utile dominum* of the conqueror will be considered as having existed from the beginning of the conquest. When it is said that the law political ceases on the conquest and that the law municipal continues till changed by the will of the conqueror, it is not meant that these latter laws, *proprio vigore*, remain in force, but that, it is presumed, the new political sovereign has adopted and continued them as a matter of convenience. They do not derive any force from the will of the conquered, for the person capable of having and expressing a will—the body politic, or law-making power of the conquered—is extinguished by the conquest. *When, therefore, we come to pronounce upon the force of a law of the conquered people after the conquest, and to determine whether it has been tacitly adopted by the conqueror, we must look to the character of its provisions, and compare them with the laws and institutions of the conquering state; that is, with the will of the conqueror as expressed by himself in similar matters. Whatever is in conflict with or directly opposed to such expressions of his will we can not presume to have been adopted by his tacit consent.* Hence, Lord Coke says, if a

> Christian king should conquer an infidel country, the laws of the conquered, *ipso facto*, cease, because it is not to be presumed that a Christian king has adopted the laws of an infidel race. But where there is no such conflict in the institutions and laws of the two countries, those of the conquered which regulate personal relations, commercial transactions, and property in all its modes of transfer and acquisition are presumed to have been adopted as a matter of convenience. This rule of international law is both reasonable and just. *Each case must rest upon its own basis and be judged of by its own circumstances.* From this view of the jurisprudence of the conquered country we must determine what laws of the acquired territory remain in force and what laws of the conqueror, *proprio vigore*, extend over such territory. (Ibid., ch. 33, sec. 19; Dana's Wheaton, p. 347, note 169.)

Taylor, a text writer of standard authority, says:

> While political laws are as a general rule suspended during the military occupation of a conquered territory—as heretofore explained in the chapter devoted to the laws of war as to enemy property on land—the municipal laws of such territory, that is, the laws regulating private rights, are generally continued in full force during the military occupation, except so far as they are changed or suspended by acts of the conqueror. As he possesses all the powers of a *de facto* government he can, of course, establish an entirely new civil code or make such changes in the old as he sees fit. (Taylor, Int. Pub. Law, p. 599.)

The action taken by General Brooke in the order of August 10, 1899, revoking the O'Reilly franchise, in pursuance of the legislative authority vested in him as commanding general of the occupying forces, was

not a capricious exercise of arbitrary power, but was based upon reports furnished by the several departments of the Cuban government, including the municipality of Havana, upon the report of a finance commission convened for the express purpose of providing a revenue for the municipality, and upon the opinion of his legal advisers. Opportunity was also given to all parties in interest to present their views, which were fully considered in the preparation of the legislative act which is embodied in the order of August 10, 1899.

(7.)

The requirements of the President's instructions of July 18, 1898, did not forbid an exercise of legislative power like that taken by Major-General Brooke in respect to the O'Reilly concession.

The Executive instructions of July 18 were intended to regulate the conduct of the commanding general in the exercise of the sovereign powers which vested in him by international law in respect to the government of such portions of the island as were occupied, from time to time, by the military forces of the United States. As the area of the occupation extended, in the operation of the protocol of August 12, the instructions of the President continued to govern the military commander in the exercise of his powers. In speaking of the scope and extent of the powers of the commanding general of the occupying forces, the President says, in his instructions to General Shafter of July 18, 1898:

> Though the powers of the military occupant are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of per-

> sons and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent; and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation. This enlightened practice is, *so far as possible*, to be adhered to on the present occasion. (Annual report of Major-General Commanding the Army, part 1, 1899.)

Later on, in speaking of the treatment of private property, the President says:

> Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways, and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity are not to be retained.
>
> While it is held to be the right of the conqueror to levy contributions upon the enemy in their sea ports, towns, or provinces which may be in his military possession by conquest, and to apply the proceeds to defray the expense of the war, this right is to be exercised within such limitations that it may not savor of confiscation. As the result of military occupation the taxes and duties payable by the inhabitants to the former government become payable to the military occupant, unless he sees fit to substitute for them other rates or modes of contribution to the expense of the government. The moneys so collected are to be used for the purpose of paying the

> expenses of government under the military occupation, such as the salaries of the judges and the police, and for the payment of the expenses of the army.
>
> Private property taken for the use of the army is to be paid for, when possible, in cash at a fair valuation, and when payment in cash is not possible receipts are to be given. (Ibid.)

It is submitted that there is, in the foregoing instructions, no such restriction upon the legislative power of the military governor as is claimed by the plaintiff in error. The laws of the occupied territory are regarded as continuing in force "so far as they are compatible with the new order of things," and "until they are suspended or superseded by the occupying belligerent."

It will not be contended that a law recognizing slavery, or involuntary servitude, is "compatible with the new order of things," and the same may be said of a law or decree authorizing the granting of titles of nobility, or denying or unduly restricting the right of suffrage, or respecting an establishment of religion. A law of Spain, or a royal decree or regulation governing the sale of public offices would be equally abhorrent to the "new order of things," and the same may be said of privileges growing out of such a grant as has been made the subject of this appeal, which operated to deny to a province or municipality the police control of a public utility, which, under a republican form of government, is habitually vested in such county or municipality as a necessary exercise of local police power and a necessary incident of local self-government.

(8.)

The action of Major-General Brooke, being within his jurisdiction and authority as commanding general of the occupying forces, was a legitimate exercise of the legislative power, and had, and could have none of the aspects of a tortious act. General Brooke's act was legislative, not that of a tort-feasor; for such an act he is not individually liable to the courts of Cuba or to those of the United States.

> The municipal laws of a conquered territory, or the laws which regulate private rights, continue in force during military occupation, except so far as they are suspended or changed by the acts of the conqueror. Important changes of this kind are seldom made, as the conqueror has no interest in interfering with the municipal laws of the country which he holds by the temporary rights of military occupation. *He nevertheless has all the powers of a de facto government, and can, at his pleasure, either change the existing laws, or make new ones.* Such changes, however, are, in general, only of a temporary character, and end with the government which made them. On the confirmation of the conquest by a treaty of peace the inhabitants of such territory are, as a general rule, remitted to the municipal laws and usages which prevailed among them prior to the conquest. Neither the civil nor the criminal jurisdiction of the conquering state is considered, in international law, as extending over the conquered territory during military occupation. Although the national jurisdiction of the conquered power is replaced by that of military occupation, it by no means follows that this new jurisdiction is the same as that of the conquering state. On

the contrary, it is usually very different in its character, and always distinct in its origin.

Halleck Int. Law, chap. XXXII, sec. V.
Cross v. *Harrison*, 16 How., 196.
Case of the Exchange, 7 Cranch, 116.
Dow v. *Johnson*, 10 Otto, 158.
Coleman v. *Tenn.*, 97 U. S., 509.
New Orleans v. *Steamship Co.*, 20 Wall., 387.
5 Opins. Atty.-Gen., 55.

Judge Cooley, in his authoritative work on torts, says:

> If we take the case of *legislative officers*, their *rightful exemption from liability is very plain*. Let it be supposed that an individual has a just claim against the State which the legislature ought to allow, but neglects or refuses to allow. In such a case there may be a moral wrong, but there can be no legal wrong. The legislature has full discretionary authority in all matters of legislation, and it is not consistent with this that the members should be called to account at the suit of individuals for their acts and neglects. Discretionary power is, in its nature, independent; to make those who wield it liable to be called to account by some other authority is to take away discretion and destroy independence. This remark is not true, exclusively, of legislative bodies proper, but it applies also to inferior legislative bodies, such as boards of supervisors, county commissioners, city councils, and the like. When such bodies neglect and refuse to proceed to the discharge of their duties the courts may interpose to set them in motion, but they can not require them to reach particular conclusions, nor, for their failure to do so, impose the payment of damages upon them, or upon the municipality they represent. (Cooley on Torts, 2d ed., p. 443, and cases cited.)

A similar rule applies to executive officers. On this point Cooley says:

> The Executive, in these particulars, exercises his discretion, and he is not responsible to the courts for the manner in which his duties are performed. Moreover, he could not be made responsible to private parties without subordinating the Executive Department to the judicial department, and this would be inconsistent with the theory of Republican institutions. Each department, within its province, is and must be independent. (*Ibid.*, 444.)

(9.)

The act of General Brooke was ratified by the proper political department of the Government.

The military occupation which was established in the island of Cuba, as a consequence of its invasion by the military forces of the United States, and which was subsequently extended so as to include the entire island, was established by the commanding general of the invading forces, acting under the instructions of the President, as the constitutional commander in chief; and all acts done by said commanding general, in pursuance of said occupation, were done under the authority of the President, as commander in chief, and of the Secretary of War, who is his representative in the conduct of all military affairs. (*U. S.* v. *Eliason*, 16 Leters, 291, 302; *Wilcox* v. *Jackson*, 13 Ibid., 498–513.)

The Army regulations, which contain the standing instructions of the President, contain the requirement that:

> Copies of all orders issued by commanders of armies or territorial departments will be forwarded at their dates, or as soon as practicable,

to the Adjutant-General of the Army and to the head of each staff department in Washington. (Par. 782, Army regulations of 1895.)

In the operation of the foregoing, a copy of every order issued by a department or division commander is required to be furnished to the Adjutant-General of the Army, and such furnishing constitutes notice to the President and Secretary of War that the order so communicated has been issued and is in operation. It is within the power and authority of the President, as commander in chief, and of his representative, the Secretary of War, to direct the revocation of any order issued by a subordinate commander which is regarded as illegal, or as beyond the authority of such commander, or even as inexpedient or inopportune. Should he fail to direct such revocation he must be held to have consented to the issue of the order and to have sanctioned its subsequent operation.

But in addition to the tacit acceptance and approval above indicated, there has been an express recognition of the order, which will be found in the decision of Mr. Secretary Root in the matter of the application of the Countess of Buena Vista for the revocation of certain orders issued by the military governor of Cuba, in the exercise of the legislative powers vested in him as the commanding general of the occupying forces. This decision was rendered on December 24, 1900, on the petition of the Countess O'Reilly and Buena Vista and of Dr. Don Gustavo Gallet Duplessis, after a public hearing at which all parties in interest were represented, and on the conclusion of which the application for the revocation of the orders of May 20, 1899, and August 10, 1899, was denied.

(10.)

The act of the military governor in revoking the O'Reilly license was an act of the United States within the meaning of Paragraph IV of the Platt amendment.

Paragraph IV, of what has become known as the Platt amendment, provides:

> That all acts of the United States in Cuba during its military occupancy thereof are ratified and validated, and all lawful rights acquired thereunder shall be maintained and protected. (Act of March 2, 1901, 31 Stat. L., 897.)

It has been seen that the act of Major-General Brooke, in the cancellation or revocation of the O'Reilly franchise or privilege, was a formal exercise of legislative power which was possessed by General Brooke to the same extent that it had theretofore been possessed by the Crown and Government of Spain. It was in no sense a personal or individual act; as little was it the merely official act of a commanding officer. The legislative power was not capriciously exercised, but after due deliberation and upon full consideration, in which all parties in interest had been fully heard, and upon reports as to the necessity for the act and of its effects and consequences.

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